FILE COPY

AUG 28

Supreme Court of the United States

OCTOBER TERM, 1958

No. 324

GENERAL MOTORS CORPORATION, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

HENRY M. HOGAN,
DANIEL M. GRIBBON,
CHARLES THOMAS,
CHARLES A. BLUNDON,
Of Counsel.

August, 1958

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	4
Reasons for Granting the Writ	7
Conclusion	16
Appendix	1a
Opinions of the Court of Claims	1a
Judgment of the Court of Claims	4a
Findings of Fact	8a

CITATIONS

Cases:

Dalehite v. *United States*, 346 U.S. 15	10
Dickenson v. *Petroleum Conversion Corp.*, 338 U.S. 507	15
Ford Motor Company v. *United States*, 156 F. Supp. 554 (C. Cls.)	8, 11
General Motors Corporation, Frigidaire Division v. *United States*, 121 F. Supp. 932 (C. Cls.), cert. denied 348 U.S. 942	5, 14
General Motors Corporation, Frigidaire Division v. *United States*, 146 F. Supp. 220 (C. Cls.)	5
General Motors Corporation, Frigidaire Division v. *United States*, 147 F. Supp. 739 (C. Cls.)	6
John Hancock Mutual Life Insurance Company v. *Bartels*, 308 U.S. 180	15
Maggio v. *Zeitz*, 333 U.S. 56	15

Statutes:

Internal Revenue Code of 1939:

Section 3405	2, 7
Section 3406	3
Section 3441	3, 8
Section 3443	3, 8

Texts and Treatises:

Williston, Sales (1948 ed.)	12

Miscellaneous:

Uniform Sales Act: Section 15(2)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION,
Petitioner,

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINIONS BELOW

The opinions in the Court of Claims (Appendix, pp. 1a-8a) are reported at 147 F. Supp. 739.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958 (Appendix, p. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. §1255 (1).

QUESTIONS PRESENTED

Does the Manufacturer's Excise Tax imposed upon the sale of refrigerators and related products apply to charges made by a manufacturer for agreements which obligate it to repair or replace the cooling units in its products should such units wear out during the second through the fifth year of use?[1]

STATUTES INVOLVED

Internal Revenue Code of 1939:

Section 3405. TAX ON MECHANICAL REFRIGERATORS, QUICK-FREEZE UNITS, AND SELF-CONTAINED AIR-CONDITIONING UNITS.

"There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which so sold:

"(a) Refrigerators and quick-freeze units. Household type refrigerators (for single or multiple cabinet installations) having, or being primarily designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline; household type units for the quick freezing or frozen storage of foods, operated by electricity, gas, kerosene, or gasoline; combi-

[1] There is also presented the question whether the expense of making good on a manufacturer's warranty constitutes a discount, rebate, or allowance for excise tax purposes. This same question is presented in the petition in No. 144, Ford Motor Co. v. United States. In addition, if the main question is answered in the affirmative, a further question would be presented: Do expenditures incurred by manufacturers in carrying out repair and service agreements constitute a discount, rebate, or allowance for excise tax purposes?

nations of such household type refrigerators and units."

* * * * *

"(c) Air conditioners. Self contained air conditioning units." 53 Stat. 412.

Section 3406. EXCISE TAXES IMPOSED BY THE REVENUE ACT OF 1941.

"(a) Imposition. There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):

* * * * *

"(3) Electric, gas, and oil appliances . . . electric, gas, or oil water heaters; . . . 10 per centum.

Section 3441. SALE PRICE.

"(a) In determining for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established, to the satisfaction of the Commissioner, in accordance with the regulations." 53 Stat. 416.

Section 3443. CREDITS AND REFUNDS.

"(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * * * *

"(2) to any person who has paid tax under this chapter with respect to an article, when the

price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited."

STATEMENT

Petitioner manufactures and sells household refrigerators and related products that are subject to the Manufacturer's Excise Tax. Since the 1920's petitioner's sales price has included a charge for a one-year warranty that constitutes a recognition by petitioner of its obligation as a manufacturer to provide a product free from defects attributable to workmanship and material and other manufacturing errors. This one-year warranty thus discharges the legal liability of petitioner as a manufacturer.

In addition, petitioner sells a repair contract, called a "Protection Plan," which obligates it to repair or replace the sealed cooling unit in its refrigerators should the unit wear out after the one-year warranty has expired and before the end of the fifth year following delivery to the initial purchaser.[2] Petitioner commenced to sell such contracts in 1933 and offered them to the purchasers of its products on an optional basis

[2] "Five-Year Protection Plan—We Warrant every new 1936 Frigidaire Household Sealed-In Mechanical Unit to be free from defects in material and workmanship under normal use and service, and we will, within five years from date of delivery to the original purchaser, replace without any cost to the customer, any Sealed-In Mechanical Unit which our examination shall disclose to our satisfaction to be thus defective, provided, however, that by so doing we shall not be obligated to replace the complete refrigerator. The foregoing applies only to the Sealed-In Mechanical Unit under conditions specified herein, and does not apply to any other parts of the Frigidaire equipment mentioned hereinafter."

until 1936. Since then petitioner has required that repair contracts be purchased for refrigerators and other products purchased for individual household use.

Petitioner made a charge of $5 for each repair contract and this case involves claims for refund of Manufacturer's Excise Taxes paid on such charges. The question whether the Manufacturer's Excise Tax is applicable to this charge has been litigated in three different cases before the Court of Claims. All three cases have involved the same law and the same contract, yet three different and inconsistent answers have been given.

In the first case, which covered charges made from May 10, 1937, through December 31, 1941, *General Motors* v. *United States*, 121 F. Supp. 932, certiorari denied 348 U.S. 942, the Court of Claims held that although the charges made for the repair agreements were subject to the Manufacturer's Excise Tax, the expenses incurred in carrying out such agreements were "allowances" within the meaning of Section 3443(a)(2) of the 1939 Code and predecessor sections of the Revenue Acts, and thus petitioner was entitled to an appropriate refund. In the second case, *General Motors* v. *United States*, 146 F. Supp. 220, covering the period from January 1, 1942, through December 31, 1944, a similar result was reached when the court below first considered the case.

In the third case, the review of which this petition seeks, a similar refund was sought with respect to the period January 1, 1945, through August 31, 1951. Petitioner requested summary judgment which was denied on the ground that the court has been "wrong in holding that [petitioner] was entitled to [a refund]

as an 'allowance.'". *General Motors* v. *United States*, 147 F. Supp. 739. Instead, the court concluded that a refund was due for the principal reason advanced by petitioner, and rejected by the court, in the first two cases—namely that the charge made for the repair agreement was not subject to the Manufacturer's Excise Tax "because it was not part of the sales price, but was an extra charge for an agreement to keep certain parts of the refrigerator in repair beyond the period of the usual manufacturer's warranty." The court thereupon withdrew the opinion it had rendered in petitioner's second case and entered judgment for petitioner on the ground that the charge for the repair agreement was not subject to the Manufacturer's Excise Tax.

In its decision in petitioner's third case, the court below held that the charge for the repair agreement should be excluded from the tax base to the extent that it was reasonable in amount, and further held that the charge should "bear a close relationship to the actual cost of rendering the service. When so limited . . . the opportunity for evasion of the excise tax practically disappears." The case was referred to a commissioner of the court to take evidence as to the reasonableness of the $5 charge made by petitioner. Subsequently, the court also directed the commissioner to take evidence on the question of whether such repair agreements were customary in the trade during the years involved.

On the evidence submitted, the commissioner found that petitioner's charge for the repair agreements was reasonably related to the costs of making repairs and was reasonable in amount, and that such repair agreements were customary in the trade.

The Court of Claims, on July 16, 1958, adopted the commissioner's findings and filed the opinion and judgment here sought to be reviewed. In that opinion, the court reversed its field once again and held that the repair agreements in question were "a taxable part of the purchase price of the article sold" because other manufacturers in the trade sold similar repair agreements. Judge Whitaker, dissenting, adhered to the position he had taken in the first decision and consistently maintained throughout this litigation —that a charge for a repair agreement is not subject to the Manufacturer's Excise Tax.

REASONS FOR GRANTING THE WRIT

The Court of Claims has erroneously decided an important question of federal excise tax law and has left the question in such a state of confusion that review by this Court is necessary. Absent an exercise of this Court's certiorari jurisdiction to make clear the application of the questioned statutory provisions, the inconsistent and confused positions taken by the court below will render it impossible to predict the excise tax consequences of the repair and replacement services conducted by much of the manufacturing industry.

Under Section 3405 of the Internal Revenue Code of 1939,[3] an excise tax is imposed upon the sale by manufacturers of "refrigerators" and "parts or accessories therefor," which excise, so far as here relevant, is a fixed percentage of "the price for which [such appliances are] so sold." A charge by a manu-

[3] The questioned excise tax provisions of the 1939 Code were reenacted without significant change as Sections 4111 and 6416 of the Internal Revenue Code of 1954.

facturer for a service contract is not subject to excise tax if it is not comprehended by the above language of Section 3405, or if it is an "other charge" which is specifically excluded by Section 3441(a). In the event the repair charge is taxed as part of "the price" of the refrigerator, the cost of repairs or replacements under the service contract should constitute an "allowance" under Section 3443(a)(2) which permits a credit or refund of the excise paid if the "price" of a taxable article is "readjusted" "by a bona fide discount, rebate or allowance."

In short, a charge for a service agreement should be excluded from tax because it is not part of the price of the article or because it is an "other charge" that is specifically excluded; if it is included as part of the price, the actual cost of making repairs under the agreement should be allowed as an adjustment to the sale price.

Though the legal questions thus presented are precise and narrow, their resolution by the court below has been inconsistent, halting and confused. In three different cases the Court of Claims has considered the separate charge for and the expense incurred under

---

[4] The Court of Claims has held that expenditures incurred in fulfilling a manufacturer's warranty and expenditures incurred in carrying out repair agreements do not come within Section 3443(a)(2). The first of these conclusions was reached by the court both in this case and in Ford Motor Company v. United States, 156 F. Supp. 554. As noted above, there is pending before this Court a petition for certiorari in the Ford case, No. 144, October Term, 1958. The Ford case does not involve repair agreements for which an extra charge is made. However, since it does present an important aspect of the allowance question the Court may wish to consider the petition in the Ford case together with the petition in this case.

precisely the same repair agreement. The first time it found that a tax was properly imposed on the charge, but recognized that the expense of providing repair services under the agreement constituted an allowance. The second time it found that no tax should be imposed upon the charge for the repair agreement to the extent it was reasonable in amount; and the third time it imposed a tax on the charge and refused to recognize that the expense of fulfilling the repair agreement constituted an allowance. Petitioner has thus recovered in one case on one theory; in the second case, on a different theory; and in the third case, has been denied any recovery in a decision which rejects both of the theories previously embraced by the court. The third holding, to which this petition is directed, rests largely, if not entirely, upon the significance which the court attached to the fact that other manufacturers in the trade entered into service and repair arrangements substantially similar to those of petitioner.

Refrigerator manufacturers do contract to provide services of the kind covered by the service agreements which petitioner sold. But nothing is said or implied in the governing statute which would impose a tax on the price of "service" sold in connection with refrigerators. Nor is there anything in the legislative history that supports such a result. The plain meaning of the statute permits the imposition of the tax only upon the price of the "article" sold. Thus, the only rational basis for the imposition of the excise here would be a finding that the sale of a refrigerator obligates a manufacturer to service it for a period of five years so that a charge for an agreement to provide such service is merely part of the price of the "article."

The record and conclusions of the court below establish, however, that repair is not part of the obligation imposed upon a manufacturer through the sale of a refrigerator. Only the terms of a specific agreement such as petitioner made, would impose any obligation upon a manufacturer to repair a refrigerator two to five years after it had been put to use. That manufacturers generally have entered into repair agreements comparable to those sold by petitioner cannot in any way affect the service character of such agreements or indicate that Congress intended to tax them simply because they were entered into by manufacturers at the time the refrigerators were sold.

The fact that manufacturers generally contract to provide repair services under agreements similar to those sold by plaintiff establishes only that the question in this case involves substantial amounts of money. It means that other manufacturers may have similar claims for refund and that excise tax collections may be less if the governing statute is not extended to cover the sale of repair services by manufacturers. Such considerations, however, are quite irrelevant to the question of statutory construction presented in this case. *Cf. Dalehite* v. *United States*, 346 U.S. 15, 60. If such services are to be subject to the excise tax, it is for Congress to so declare. And in the absence of such a declaration it is not open to the courts to amend the statute to avoid a possible revenue loss.

The court below may have confused a repair agreement with a warranty that a product is free from defects, which is an integral feature of any manufactured product. In an earlier decision in this case the court referred to a warranty that an article

when sold is in good working condition and free from defects, and stated that the sales price includes such a warranty. More recently in the *Ford Motor* case, *supra*, the court again expressed the view that a warranty that an article is free from defects is an integral part of the product. It would seem that the portion of the price of a product attributable to such a warranty would be subject to the excise tax because the purchaser would be thus receiving only what he had a right to receive—a refrigerator free from defects in workmanship and material. In its final opinion, however, the court ignored its previous acknowledgement that the one-year warranty satisfied the manufacturer's obligation to sell a sound refrigerator, and taxed the charge for a repair agreement as if it were no more than a warranty against defects of workmanship and material.

Repair agreements are something quite different—as the owner of an appliance such as a television set will at once know. Assuming perfect workmanship and material, ordinary wear and tear will demand repair and replacement of parts and components. As a matter of customer contentment and product prestige nearly every appliance manufacturer will either undertake to provide repair service for at least the more complicated components of his product or recommend to the customer that all specialized work on the appliance be done by "authorized dealers."[5] To

[5] The court below found that the repair services performed by petitioner under the agreements in question were "attributable to certain types of wear and tear" caused by the use of the refrigerators or to other factors beyond petitioner's control and not to defects in workmanship and material or other manufacturing

the extent the former procedure has been adopted by petitioner with respect to its refrigerators, it sells service contracts obligating it to make any necessary repairs on the sealed cooling unit for four years after the one-year warranty has expired. The question would not be different were the period ten years and the product a televison picture tube.

Since the legal obligation of a manufacturer extends only to defects of workmanship and material in the product at the time of sale,[8] a manufacturer need not undertake, for any price, to repair his product after it has been in use for a period of years. Thus, as found by the court below, petitioner did not sell repair agreements for a substantial number of refrigerators sold to multiple unit purchasers for other than household use. (Findings 26 and 88, Appendix pp. 15a, 16a, 38a). Where such repair contracts were sold, however, the sale was of a separate service quite apart from the refrigerator and the legal obligations which its price included. As a matter of statutory construction there is no basis for holding that the repair agreements were

---

errors. The court noted that an example of the cause of such wear and tear would be the "operation of the unit under low voltage." In this connection, the court also found that since the early 1930's repair agreements to provide service following the expiration of the manufacturer's one-year warranty have been widely sold in metropolitan areas by independent service and repair companies which neither manufacture nor sell the refrigerators covered by their repair agreements. (Findings 57, 61, 63, App. pp. 29a, 31a). If the court's reasoning be valid, the charge made by such non-manufacturing repair companies should also be subject to the excise tax.

[8] Section 15(2), Uniform Sales Act, (1950 ed.); 1 Williston, Sales § 232 (1948 ed.).

a part of the article and that the price of the service undertaking was a part of the price of the article.[7]

Should the decision below be allowed to stand, a statute which imposes a tax on the price for which selected manufactured products are sold will have been used to exact a tax upon amounts received for the performance of repair services.

Respondent argued below that should the separate service charge be excluded from the tax base, an easy device for reducing the proper amount of excise would be created. This argument involves a padding of the price of the service agreement with a corresponding decrease in the "price" of the refrigerator. The court

[7] Other Federal agencies that have had occasion to examine into the characteristics of repair contracts have concluded that they do not represent a manufacturer's obligation but are separate service agreements.

(a) The NRA Code, which was in effect during the period these contracts were developed, specified the standard one-year warranty as the required obligation of a manufacturer. It recognized the existence of repair and replacement contracts, but excluded them from the price of a refrigerator and provided that they should be the subject of individual arrangements.

(b) The specifications for refrigerators which the National Bureau of Standards, in conjunction with other agencies, developed for the guidance of Federal Purchasing agents from 1941 through 1956 prescribed a one-year warranty but made no mention of repair contracts on sealed units. Clearly such a contract was regarded as an extra and not as an integral part of a refrigerator.

(c) Both the Office of Price Administration during World War II and the Office of Price Stabilization during the Korean War were required to consider the proper pricing of refrigerators. Both viewed the one-year warranty as an integral feature of a refrigerator and allowed the expenses attributable to its fulfillment to be considered in pricing the product. Neither regarded the repair agreements as a part of the refrigerator and both regulated its pricing, not as part of the product, but as a separate service.

below—in its intermediate opinion—recognized the force of this argument and provided that no charge should be excluded from tax unless it was established to be reasonable in amount. Insofar as petitioner is concerned, the court found the argument to be without merit since the entire charge was reasonably related to the services performed.[8] But aside from petitioner's case, clear statutory language must be respected even though in some instances the language used by Congress might create administrative problems. If the language needs correcting, Congress must do it.[9]

---

[8] The following facts were found by the Court below and are set forth in Findings 72 and 73 (App. p. 33a):

When the repair agreement program was first instituted in 1936 the charge was set at $5.00 (except as to self-contained air conditioners). This original charge was based on petitioner's determination that the probable cost for the repair of a single unit would be approximately $25.00 and that not more than 20 percent of the units sold would become inoperative during the four-year period of the agreement. On that basis it was determined that a charge of $5.00 paid by each purchaser would meet the anticipated costs. From 1936 to the present time, however, petitioner has annually reviewed and re-examined its charge for the agreements by considering past experience, and making the best forecast possible for a future period as to the number of units which might require repairs, the nature of the repairs, and the prospective cost of the repairs. At all times the charge arrived at was intended to meet estimated expenses with a reasonable margin for possible increases in cost and errors in forecasting. Thus, the original $5.00 charge has not been arbitrarily maintained from the inception of the program through the period of this claim but has been annually reviewed and re-examined. The court thus found that the $5 fee "was a reasonable charge." Finding 94, App. p. 41a.

[9] On January 9, 1956, after the Court of Claims first opinion, 121 F. Supp. 932, the Treasury Department and the Joint Committee on Internal Revenue Taxation submitted a Report to the House Subcommittee on Excise Tax Technical and Administrative Problems. In that report, Congress was strongly urged to revise

Since the decision of the Court of Claims is entirely without precedent and raises serious and complicated excise problems for a broad segment of the nation's industry, the absence of conflicting decisions in other tribunals should not deter the Court from issuing the writ. If conflict in this area be needed, however, the doctrine of "intra circuit conflict"[10] warrants an exercise of this Court's certiorari jurisdiction. In accordance with that doctrine, the Court exercises jurisdiction to resolve a question that has been inconsistently decided in but one of the eleven circuits. Certainly the Court is warranted in clarifying the confusion created by this case in view of the fact that the Court of Claims is vested with nationwide jurisdiction in excise tax refund suits, and is the only lower Federal tribunal that enjoys such jurisdiction.

---

the relevant provisions of the 1954 Code to preclude the "allowance" of expenses incurred in the repair of a refrigerator under a warranty, and to provide that the excise tax would apply "where the taxpayer makes a separate compulsory charge" for a repair contract. Thus, the Treasury Department recommended that "the definition of sale price for purposes of the retailers' and manufacturers' taxes be amended to include specifically compulsory charges for the warranty of the articles." It also asserted that any report accompanying such recommended legislation "should indicate that these amendments are declaratory of the intent of Congress as originally expressed in enacting section 6416(b)(1) of the 1954 Code, and the corresponding provisions of the 1939 Code and prior laws." Despite these recommendations, Congress refused to amend the provisions in question. This refusal is the more significant since in the subsequent Forand Bill (H.R. 7125, passed by both Houses of Congress and now awaiting the approval of the President), though Congress made major revision in the excise tax provisions of the 1954 Code, no change was made in the "definition of sale price" or in the "allowance" provision.

[10] *Dickenson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508; *Maggio* v. *Zeitz*, 333 U.S. 56; and *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U.S. 180.

CONCLUSION

As established by the findings of fact below, petitioner, for sound business reasons and not as part of its manufacturer's obligation, charged the purchasers of its refrigerators a separate and reasonable fee for long term repair contracts covering the cooling units of such refrigerators. The application of the Manufacturer's Excise Tax to this fee results in the collection of an excise on repair service charges—a result achieved only by a clear extension of the governing statute.

The Court of Claims has thus erroneously decided a question of substantial importance which, for the reasons stated, should be reviewed by this Court. Accordingly, the petition for a write of certiorari should be granted.

Respectfully submitted,

NEWELL W. ELLISON
Attorney for Petitioner

HENRY M. HOGAN
DANIEL M. GRIBBON
CALVERT THOMAS
COVINGTON & BURLING

Of Counsel

August, 1958

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 55-56

(Decided July 16, 1958)

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION, v. THE UNITED STATES

---

* * * * * * * * * * *

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This is the latest in the succession of suits brought by this plaintiff to recover excise taxes exacted from it by the Government in connection with the plaintiff's manufacture and sale of electric refrigerators. The first of the cases is reported in 128 C. Cls. at page 465. In that opinion, which was on the merits, the plaintiff's five year warranty of the refrigerating unit in its refrigerators, the so-called "Five Year Protection Plan", is described in detail and its history is recited. The court held that the actual expense of the plaintiff's repair and replacement of these units in satisfaction of its warranty was an "allowance" within the meaning of section 3443 (a) (2) of the Internal Revenue Code of 1939, and that the plaintiff could recover on that basis. Two judges, dissenting in part, would have held that the five dollar charge made by the plaintiff in the five year warranty was not a part of the price of the refrigerator and was therefore entirely exempt from the excise tax.

In the plaintiff's second case, No. 49428, decided on the merits November 7, 1956, the court's decision was the same as in the first. Chief Judge Jones and Judge Laramore concurred, but with the express statement that "recovery in such cases is and should be limited to the cost incident to

a protective plan that goes beyond the customary guarantee or service applicable in the trade generally."

In the instant case the court has made a finding that the five year warranty of refrigerating units has been customary in the trade generally during the years involved in all of the plaintiff's suits. It thus becomes evident that the concurrence of Chief Judge Jones and Judge Laramore in the second case resulted from matters regarded by them as vital to the decision but about which no facts appeared of record in either the first or second case.

It will be remembered that the original *General Motors* case, decided in 1954, had not directly raised the issue of the custom in the trade as to the five year warranty. The plaintiff's brief and the court's finding 17, in that case, referred only to the fact that the one year warranty had become standardized in the refrigeration industry. While the record did not show clearly that the extended warranty for the sealed units was not adopted by the trade, the clear implication of the few references in the record is to the effect that it was not the custom in the trade generally. Therefore, the issue in the present case and the issue in the first *General Motors* case are different, both factually and legally, a matter which we will discuss more fully below.

In the plaintiff's third case, No. 55-56, decided January 16, 1957, the plaintiff sought to press the court's previous decisions to what the plaintiff insisted was their logical conclusion. It urged that the cost of fulfilling its one year warranty of all parts of its refrigerators should be treated as an "allowance" under section 3443 (a) (2). It also made the same contentions as to its five year warranty of its refrigerating units which it had made in the earlier cases. The court rejected the plaintiff's contention as to the one year warranty, and adopted the plaintiff's original contention as to the five year warranty of the refrigerating unit. It held that the five dollars charged for the five year warranty was not a part of the price of the refrigerator and hence was not subject to the excise tax. Judge Little-

ton, concurring in part and dissenting in part, would have adhered to the court's first decision based on the allowance theory, because he thought that the doctrine of collateral estoppel required that decision.

The writer of this opinion dissented, taking the position that the price paid for warranties in connection with sales of refrigerators was a taxable part of the purchase price, and that the cost of fulfilling the warranties was not an "allowance" within the meaning of section 3443 (a) (2). The latter position was, of course, a departure from his earlier views.

The court in the plaintiff's third case referred the case to a trial commissioner of the court to take evidence only on the question of the reasonableness of the plaintiff's five dollar charge in relation to the actual cost of fulfilling the warranty. On June 12, 1957, the trial commissioner was also ordered to take evidence on the question of whether the five year warranty was customary in the trade during the years in question.

As stated above, the court has now made a finding of fact that the five year warranty in question is customary in the trade, and has been so almost from the time that the plaintiff introduced it. The fact which was not made to appear in the earlier cases, but which the Chief Judge and Judge Laramore regarded as vital, is now a fact of record. A majority of the court is therefore of the opinion that the plaintiff is not entitled to recover, because the price paid for these warranties was a taxable part of the purchase price of the article sold.

The instant case might appear to suggest a problem of collateral estoppel. The effect of the application of the doctrine would be to set the plaintiff apart from its competitors and from all other taxpayers similarly situated. Such a doctrine of "repose" would have to have a truly compelling reason behind it.

The Supreme Court of the United States in *Commissioner v. Sunnen*, 333 U. S. 591, makes plain its view that

the doctrine of collateral estoppel is to be sparingly used in tax cases. The Court said, at page 601:

> And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they may be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue.

As we have stated above, the issue in the original *General Motors* decision and the issue presently before the court are different. The *Sunnen* case at page 599 makes it clear that the doctrine of collateral estoppel shall only be applied when the issues remain "static, factually and legally." That is not our case.

The writer of this opinion expressed his views on the collateral estoppel question in *Engineer's Club of Philadelphia* v. *United States*, 95 C. Cls. 42, which was cited with apparent approval in *Sunnen*, at page 601.

The plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge*, and JONES, *Chief Judge*, concur.

LITTLETON, *Judge*, concurring:

On the occasion of the court's opinion in this case on January 16, 1957, I dissented from the holding that the charge made by the plaintiff for the contract to maintain the units after the expiration of the one year warranty was a separate charge in the nature of insurance and excludable from taxation as such under section 3441 (a) of the Internal Revenue Code of 1939 so that plaintiff became

entitled to recover taxes paid on the $5 charges collected from purchasers of such units. The ground of my dissent was that under the doctrine of collateral estoppel the court was bound by its decision rendered in *General Motors* v. *United States*, 128 Ct. Cls. 465, in which cross petitions for *certiorari* were denied by the Supreme Court on February 14, 1955, 348 U. S. 942. I was of the opinion that the doctrine of collateral estoppel was applicable because at that stage of the proceedings, i. e., on plaintiff's motion for summary judgment in the third *General Motors* case (No. 55-56), there appeared to be no change in the facts or issues from the first *General Motors* case. Upon remand to the trial commissioner of the court for hearing it was established as a fact that the extended warranty for more than one year had become a custom in the industry and was a custom in the industry during the period involved in the first *General Motors* case. This fact I believe to be most material although it was not raised nor was it a matter of record in the first or second *General Motors* cases, and I agree with Chief Judge Jones and Judge Laramore that it raises a new issue of great importance. Accordingly, since we now are faced with "points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time", I am of the opinion that the parties are free to litigate such points in this proceeding and that the doctrine of collateral estoppel is no longer applicable. *Commissioner* v. *Sunnen*, 333 U. S. 591, 598.

Reaching the merits, I concur in the majority's opinion thereon.

WHITAKER, *Judge*, dissenting:

In my opinion, the result now reached by the majority is inconsistent with the court's opinion delivered on January 16, 1957. In that opinion we held that the $5 charge made by plaintiff for an agreement to maintain the freezing units in its refrigerators for a period of four years, in addition to the customary one-year manufacturer's warranty, was not a part of the sales price.

The case was then referred to Commissioner Akers to take proof on two things: first, whether the charge for the agreement to keep the freezing unit in repair for four years, in addition to the usual one-year warranty, was reasonable; and, second, whether in the taxable years in question it had become the custom of the trade for the manufacturer to agree to keep the freezing unit in repair for five years.

On the first question he found the charges were reasonable, and on the second he found that this was the custom of the trade. It is this latter finding that has led astray at least some of my brethren.

Notwithstanding this finding, I still think the agreement to keep the freezing units in repair for four years, in addition to the usual one-year warranty, was no part of the sales price of the refrigerator, but was something the manufacturer agreed to give the purchaser, in addition to a refrigerator free of defects from workmanship and material.

The purchaser of an article from a manufacturer is entitled to no more than a warranty that the thing sold is free of defects in material and workmanship.

In the various trades the manufacturer is accustomed to fix a limited period within which such defects are supposed to appear, which varies with the article sold. In the case of electric refrigerators, the proof in the *General Motors* case clearly shows that the customary period from the time electric refrigerators were put on the market in 1920 until 1936 was one year. The proof also shows that if something went wrong with the freezing unit after the one-year warranty period, it had to be repaired at the customer's expense. Because such repairs were frequently unsatisfactory, the General Motors in 1933 offered to its customers an agreement to make necessary repairs after the one-year period for a charge of $6 per year.

Two years later, in 1935, General Motors offered its customers an agreement to keep the freezing unit in repair for a period of four years. Under the 1933 agreement this

would have cost the customer $24, but General Motors reduced its price for this to $10. The following year General Motors further reduced its price to $5, for the agreement to keep the machine in repair for four years after the expiration of the one-year warranty; but, while the former agreements were optional with the purchaser, the new plan, called the "Protection Plan", was obligatory.

But, even though the purchaser was required to take and pay for this "Protection Plan", there can be no doubt that it gave the purchaser something in addition to the obligation of the manufacturer to remedy defects in material and workmanship, which had to appear within the one-year warranty period, in order to hold the manufacturer liable to make them without expense to the customer.

General Motors, being perhaps the largest manufacturer of electrical refrigerators, set the pattern for the industry, and when General Motors put into effect its "Protection Plan", agreeing to keep the machine in repair for four additional years, whether the defects occurred from wear and tear or from any other cause, other manufacturers felt obliged to follow its example. The result was that today all manufacturers of electric refrigerators sell their machines with the agreement to keep them in repair for a period of four years, in addition to the customary one-year warranty.

But, notwithstanding the fact that this has become the custom of the trade, it is nevertheless true that this "Protection Plan", under which the manufacturer agrees to keep the machine in repair for four years in addition to the usual one-year warranty, is an agreement over and above the obligation of the manufacturer to make repairs appearing within the usual one-year warranty period, that is, repairs necessitated by defects in material and workmanship.

The usual one-year warranty was given to discharge the manufacturer's obligation to sell a sound article, free from defects in material and workmanship. He could not make a charge therefor and claim that it was not a part of the

sales price, because the sales price was for a sound machine—all as more fully explained in our prior opinion. But, the manufacturer could properly make a charge for a maintenance contract, beginning after the end of the warranty period, because this was a contract to make repairs not required under its warranty that the machine it had sold was free from defects.

I think this is a proper analysis of the transaction. If it is, the $5 charge is no part of the sales price of the refrigerator, and, thus, is not subject to the excise tax.

For this reason, I dissent.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Richard H. Akers, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff, General Motors Corporation, at all times material to this cause of action, was and is a domestic corporation organized and existing by virtue of the laws of the State of Delaware with its principal place of business in the city of Detroit, Michigan.

2. The Frigidaire Division has at all relevant times been a division or branch of the plaintiff with its principal office in Dayton, Ohio.

3. The principal business of the Frigidaire Division is the manufacture and sale of electrical appliances. During the period of the claim in this action, January 1, 1945, through August 31, 1951, it sold the following products manufactured by it: household refrigerators (and refrigerating apparatus, electric ranges, electric water heaters, water and beverage coolers, ice cream cabinets, air conditioning equipment, quick freeze units, dehumidifiers, washers, driers, dishwashers and similar appliances and equipment.

4. During the period of the claim in this action, certain of the articles manufactured and sold by the plaintiff were

subject to the manufacturer's excise tax imposed by Section 3405 of the Internal Revenue Code of 1939. The plaintiff filed timely returns and paid manufacturer's excise taxes upon its sales prices of such articles.

5. The Commissioner of Internal Revenue (hereinafter sometimes referred to as the "Commissioner") has assessed and the plaintiff has paid additional manufacturer's excise taxes for the period of January 1, 1945, through August 31, 1951, in the amount of $2,484,901.09, plus interest in the amount of $108,543.40. Payments of the above amounts were made to the Collector of Internal Revenue at Cincinnati, Ohio, on the dates and in the amounts as follows:

Date of payment	Period during which products involved were sold (dates are inclusive)	Tax assessed	Interest on tax	Total payment
May 26, 1947	Jan. 1, 1945 through Mar. 31, 1947	$415,064.74	$16,443.89	$431,508.63
Nov. 5, 1948	Apr. 1, 1947 through June 30, 1948	490,506.01	23,135.21	513,641.22
Oct. 28, 1949	July 1, 1948 through July 31, 1949	326,427.82	19,302.51	345,730.33
July 5, 1950	Aug. 1, 1949 through Feb. 28, 1950	252,947.18	7,263.71	260,210.89
Nov. 9, 1951	Mar. 1, 1950 through Aug. 31, 1951	797,915.34	42,438.08	839,453.42

The basis for such additional taxes was the inclusion by the Commissioner as a part of the selling price of the various appliances of the charge by plaintiff for a Protection Plan (hereinafter more particularly described both as to its nature and to its relationship to the selling price) on various products subject to the manufacturer's excise tax, including household refrigerators, air conditioners, water heaters, food freezers, and on replacement units for certain of such products. The amount received by the plaintiff from this source in the period here involved and on which the additional taxes were computed aggregated $27,333,912.00, of which $2,484,901.09 was treated and assessed by the Commissioner as manufacturer's excise tax thereon.

6. The plaintiff has not included any excise tax on the amount received by it for the Protection Plan, either as part of the charge for the plan or as part of the price of the products covered by such plan, and has not collected the amount of any such tax from the purchasers of its

products. However, the Commissioner collected taxes on the amount received for the Protection Plan at the rate of 1/11th thereof, the rate of tax at the time being 10 percent.

7. On May 21, 1951, and October 31, 1952, the plaintiff duly filed, pursuant to the applicable law and regulations, claims for refund with respect to the additional taxes and interest described in finding 5, in the total amount of $2,593,444.49. The plaintiff has not been informed of any final action by the Commissioner or any other official on such claims for refund.

8. The gross sales of taxable products by the plaintiff's Frigidaire Division during the period of the claim in this action, January 1, 1945 through August 31, 1951 was $772,374,823.42.

9. The practice of a manufacturer of expressly warranting his products against defects in workmanship and material or other manufacturing errors which are in the product at the time it is delivered to the purchaser has often been followed. The period of such warranty has varied depending upon the nature of the product and the use to which it is normally put. In the refrigeration industry, by the late 1920's, one year had come to be recognized and observed by most manufacturers as the appropriate period of that warranty, hereinafter sometimes referred to as the "One-Year Warranty."

10. The plaintiff adopted the One-Year Warranty for its products about the middle of the 1920's and has continued that warranty through the present time. It has been plaintiff's experience that to the extent there are defects in its products attributable to workmanship and materials or other manufacturing errors, such defects usually appear within the first year of use of the product. Thus the One-Year Warranty was a recognition by the plaintiff of its obligation as a manufacturer to provide products free from such defects.

11. Under the One-Year Warranty the plaintiff undertakes to repair or replace any part or parts of the product found to be defective in workmanship or material or due to other manufacturing errors within one year from the date of delivery to the original purchaser. The original purchaser (sometimes otherwise referred to herein as "ultimate consumer" or "original user") is the first purchaser who becomes a user of the product; for example, the first householder who purchases an appliance from a dealer and has it installed in the home. Under certain circumstances when a product becomes inoperative after the expiration of the One-Year Warranty, because of defects in workmanship or material or because of other manufacturing errors, the plaintiff considers that such defects should be remedied as part of its manufacturer's obligation and as a normal practice charges the expenses necessary to remedy them to the One-Year Warranty reserve, described below. However, defects in the character described in the preceding sentence arise in only a few instances and are recognized by the plaintiff by reason of some particular difficulty with the product.

12. No separate charge has ever been made by the plaintiff for the One-Year Warranty and at all times an amount calculated to cover the probable expense thereunder has been set up as a reserve, which has been taken into consideration in determining the selling price of the manufactured article. The plaintiff's method of calculating this reserve has varied. Originally a fixed figure of one dollar or two dollars was allowed but in more recent years a percentage of manufacturing costs has been set aside to cover probable expenses under the One-Year Warranty.

13. Performance under the One-Year Warranty is carried out under a joint arrangement between the plaintiff, as the manufacturer, its distributor, and the dealer who sells the product to the original user. The plaintiff, through its distributors, supplies the necessary material and absorbs the transportation expenses in connection

with such material, while the dealer is responsible for labor and installation charges.

14. The reserve established by the plaintiff for the One-Year Warranty is charged with all expenses incurred by the plaintiff in performing the One-Year Warranty obligation as well as certain other expenses incurred in repairing defects in workmanship and materials or other manufacturing errors which appear after the expiration of the One-Year Warranty period as indicated in the preceding finding. Such reserve is treated by the plaintiff as one involved in the manufacturer's cost of products manufactured and sold, and is closed out each year directly as an item of profit and loss on current operations.

15. During the period January 1, 1945, through August 31, 1951, the plaintiff continued to give the standard manufacturer's warranty of one year on its products. Unlike the charge for the Protection Plan (hereinafter more particularly described), the charge for this One-Year Warranty was not separately billed and accounted for but was computed into the sales price of the products which was used as the basis for the excise tax paid by the plaintiff. In other words, the anticipated expenses of fulfilling the warranty were not separately charged to the purchasers of plaintiff's products but were taken into consideration by the plaintiff as expense items in fixing the price of its products.

16. The plaintiff expended approximately $6,044,504.02 to fulfill its obligations under the One-Year Warranty applicable to taxable products sold during the period of this claim, January 1, 1945, through August 31, 1951. That figure, however, is subject to verification by the defendant in the event it should become material in determining the amount of recovery under the plaintiff's second cause of action.

17. Until 1933 independent dealers and, in some cases, distributors, who sold the plaintiff's products but were

otherwise unaffiliated with the plaintiff, performed the bulk of the repair service required upon the products manufactured by the plaintiff following the expiration of the manufacturer's One-Year Warranty.

18. In 1933 the plaintiff concluded that the service rendered by numerous of its dealers and distributors might be inadequate and determined to expand its own facilities and enlarge the scope of its own repair operations with the objective of providing for all the users of its products a high quality and low priced service. Since the late 1920's the plaintiff had provided some repair services at Dayton but had confined itself principally to selling service parts to dealers and others.

19. To carry out the objective described in finding 18, the plaintiff commenced to sell optional "Frigidaire Service Agreements" on its products in the latter part of 1933. Similar agreements variously called repair or maintenance agreements, had theretofore been widely used by dealers and distributors in the servicing of refrigeration products, and the plaintiff had encouraged the sale and use of such agreements.

20. Under the Frigidaire Service Agreement which it sold from late 1933 through 1935, the plaintiff agreed to repair, adjust and maintain, as necessary, the mechanical refrigerating unit on any product with respect to which the agreement was purchased. The agreement was sold to cover a period of one, two or three years following the expiration of the manufacturer's One-Year Warranty, at a cost of $6 per year, and its purchase was optional with all purchasers of products manufactured by the plaintiff.

21. To enable it better to perform repair services under the Frigidaire Service Agreement it sold, the plaintiff established repair service stations in New York, New York; Kansas City, Missouri; Oakland, California; and Atlanta, Georgia, in addition to the shop already in operation in Dayton, Ohio.

22. In 1935 the plaintiff introduced and began to sell another type of service or maintenance agreement called a "Four-Year Replacement Contract." The plaintiff limited this agreement to the rotary type of mechanical refrigerating unit which powered certain of the products sold by it. Under this agreement the plaintiff undertook to replace such unit in the event it became inoperative within four years following the expiration of the manufacturer's One-Year Warranty. The cost of the agreement was $10 and its purchase was optional with the purchaser of products manufactured by the plaintiff.

23. No manufacturer's excise tax was assessed or collected by the Commissioner on the amounts received by the plaintiff from the sale of Frigidaire Service Agreements and Four-Year Replacement Contracts in 1933, 1934, and 1935, when the purchase of such agreements was optional, although the products which they covered were subject to such tax.

24. In 1936, for reasons hereinafter set forth (see findings 27 and 28) the plaintiff discontinued the sale of both the Frigidaire Service Agreement and the Four-Year Replacement Contract and instituted the Protection Plan. The Protection Plan, like the Four-Year Replacement Contract, is an agreement by the plaintiff to repair or replace the refrigerating unit (or, in plaintiff's parlance, the "sealed unit") in one of plaintiff's products if the unit becomes inoperative within a prescribed period. In the case of new products, plaintiff's obligations and performance under the Plan commence one year after delivery of the protected product to the first user thereof (i. e., immediately upon the expiration of the One-Year Warranty) and continue for a period of four years thereafter. As will hereinafter appear, at or about the same time, it became customary in the trade for other manufacturers of household refrigerators containing a sealed-in refrigerating unit, in the sale of their products, to include an agreement similar to that of plaintiff described above.

In addition to sales of the Protection Plan on new products plaintiff also sold the plan in connection with sealed units which are inserted as replacements for inoperative units in products as to which neither the One-Year Warranty nor the Protection Plan was then in effect. When a sealed unit in such a product failed, the user could turn in (or "exchange") the defective unit and purchase from the plaintiff both a replacement sealed unit and the Protection Plan thereon, in which case the plaintiff's obligations and performance under the plan commenced immediately upon the installation of the replacement unit and continued for a period of four years thereafter.

The One-Year Warranty on new products did not apply to such replacement units; where a user turned in a defective unit from an out-of-warranty product and purchased a replacement unit without the Protection Plan, he received only a 30-day warranty on that replacement unit.

25. The physical activities of the plaintiff and others acting under its direction in discharging the plaintiff's obligations under the Protection Plan related exclusively to the reoperation of the refrigerating unit.

Neither the charge for the Protection Plan nor the expenses which the plaintiff expected to incur in performing its obligations under the Protection Plan entered into the unit prices which the plaintiff otherwise charged for its products in 1936, when the Protection Plan was instituted, or at any time thereafter.

26. Whereas the Frigidaire Service Agreements of 1933-35 and the Four-Year Replacement Contracts of 1935-46 had been sold by the plaintiff at the option of purchasers of its products, since the institution of the Protection Plan in 1936 the plaintiff has required that the plan be purchased on every product to which it was applicable except that in the case of purchasers of the plaintiff's ice cream cabinets and "multiple unit purchasers" the plaintiff has, at various times, not required the purchase of the Protection Plan but has made it available at

the option of such purchasers. A "multiple unit purchaser" is a purchaser who buys large quantities of products manufactured by the plaintiff, such as a builder, an apartment house owner, or a national account.

27. By the payment of the charge for the Protection Plan any purchaser thereof became entitled to the four-year protection which it afforded. The plaintiff's purpose in substituting the Protection Plan for the agreements previously offered on an optional basis and in requiring all purchasers except "multiple unit purchasers" and purchasers of the plaintiff's ice cream cabinets to come under the Protection Plan was to make better repair service available to all users of its products at a reduced charge.

28. The plaintiff expected to increase substantially the number of participants in its service program over the number that had participated when the service agreements were offered on an optional basis. By thus broadening the coverage the plaintiff expected that it would be called upon to repair a smaller percentage of protected units than it had been required to repair under the optional plans previously sold by it.

The plaintiff also expected that the volume of repair business assured it through the increased number of participants would permit a substantial reduction in the unit cost of the services it was obliged to perform under the Protection Plan and had been obliged to perform under the service agreement sold in the three previous years.

29. The plaintiff's institution of the Protection Plan and its decision as to the products to be covered and the extent to which purchasers of its products should be required to pay the additional charge for the Protection Plan were not influenced by the imposition of the manufacturer's excise tax. Since the inception of the Protection Plan the plaintiff has manufactured and sold water coolers, beverage coolers, dehumidifiers, food freezers, and replacement units which at various times have not been subject to the

manufacturer's excise tax but were nevertheless at all times subject to the plaintiff's requirement for the payment of an additional charge for the Protection Plan. Likewise, since the inception of the Protection Plan, plaintiff has manufactured and sold products which at various times have been subject to the excise tax—electric ranges, driers, dishwashers, and truck cooling units—as to which the One-Year Warranty but not the Protection Plan has been applicable.

30. Beginning in 1936 and throughout the period of the claim in this action, January 1, 1945, through August 31, 1951, the charge for the Protection Plan was $5 with respect to all products and models thereof on which the Protection Plan was sold except that for self-contained air conditioners the charge varied from $5 to $90 depending upon the size and type of the product.

31. Although the One-Year Warranty on new products covered the entire product (including the sealed unit) for one year after delivery, and the Protection Plan covered only the sealed unit for four years after the expiration of the One-Year Warranty, the plaintiff's sales department urged that when the terms of the two agreements were put in writing, they be phrased in such a way as to show separately (1) the total period of coverage on the sealed unit (five years) and (2) the coverage of all other parts of the product (one year). Accordingly, in order to make the agreements as simple and as clear to the user as possible, they were incorporated in a single certificate captioned "Frigidaire 5-Year Protection Plan" which reads as follows:

> We warrant this Frigidaire refrigerator to be free from defects in material and workmanship under normal use and service.
>
> 5-YEAR WARRANTY ON SEALED IN MECHANICAL UNIT.—At any time within five years from the date of delivery to the original purchaser, we will repair or replace without cost to the owner or user the Sealed-in Me-

chanical Unit [consisting of the condenser, refrigerant control, freezer, Meter-Miser compressor unit, the tubing used to connect this equipment, and the Sealed Cold-Wall system, as shown in gold in the illustration at the right], or any part thereof, provided our examination shows that such apparatus is defective. This 5-Year Warranty applies only to the Sealed-in Mechanical Unit. All other parts of the refrigerator including temperature control and starting relay, are covered only by the 1-Year Warranty.

1-YEAR WARRANTY ON ENTIRE REFRIGERATOR.—At any time within one year from the date of delivery of this Frigidaire refrigerator to the original purchaser, we will repair or replace without cost to the owner or user any part or parts of the refrigerator, provided our examination shows such part or parts to be defective.

These warranties do not apply to light bulbs—or to any part of the Frigidaire refrigerator which has been subject to misuse, neglect, alteration, accident, or to damage caused by transportation after the original installation—or to any damage caused by flood, fire, or acts of God. Service calls, other than those covered by conditions specified in these warranties as our responsibility will be made at the expense of the user. These warranties apply only to refrigerators installed in the United States and Canada.

32. During the period of the claim in this action, the plaintiff, until February 1, 1946, in the regular course of business sold the products manufactured by it directly to independent distributors, dealers, multiple unit purchasers, and infrequently to ultimate consumers. Plaintiff maintained during this time from seven to nineteen branch offices which handled its products essentially as distributors. After February 1, 1946, plaintiff sold its products to Frigidaire Sales Corporation, a wholly owned subsidiary corporation, and to independent distributors of whom there were approximately sixteen to twenty-five. Frigidaire Sales Corporation and the independent distributors sold in turn to independent dealers, whose number varied between 8,000 and 11,000, directly to multiple unit purchas-

ers, and occasionally to ultimate consumers. The great bulk of the sales of the plaintiff's products to ultimate consumers were made by independent dealers who had previously purchased either from the plaintiff directly, from independent distributors, or from Frigidaire Sales Corporation.

33. The plaintiff as a regular practice on all invoices rendered by it throughout the period of the claim covered by this action billed the Protection Plan separately from the unit price of the products which the plan protected.

34. The practices of the independent dealers, who numbered between 8,000 and 11,000 during the period of this claim, were not uniform with respect to the manner in which the products, on which the Protection Plan was sold, were invoiced to their customers. Some itemized the amount for the Protection Plan separate from the price for the products, while others rendered a bill in a single amount which included both the price for the products and for the Protection Plan. The dealers generally made known to prospective customers by various means the general nature of the Protection Plan and the fact that included in the total amount paid was an amount (usually $5) on account of the Protection Plan.

35. The plaintiff discharged its obligations under the Protection Plan by establishing and maintaining a cyclical flow of sealed units which operated essentially as follows: when the plaintiff entered upon the manufacture of a particular model of a particular product, it manufactured more sealed units than cabinets, thus creating a "bank" of extra sealed units which were held in an inventory account and warehoused until such time as they were needed to replace units which became inoperative after delivery of the refrigerator to the user. The extra units were delivered, as needed, first to the plaintiff's distributors and thence to dealers who installed them in refrigerators in which the original units had become inoperative. The inop-

erative unit, when removed from the refrigerator, was sent by the dealer to one of the plaintiff's several repair shops for repair. After the repair shop had reoperated the unit, renovating it as completely as possible, the unit was returned to the "bank" for future use as a replacement unit, thus completing the cycle. In thus fulfilling its obligations under the Protection Plan, the plaintiff's usual practice, as just shown, was to replace a defective or inoperative unit with one obtained from its "bank" which was in operating condition rather than to repair and return to the same customer the unit which had been found inoperative. At no time, during the period here involved, did the plaintiff or its distributors or dealers, in the fulfillment of the plaintiff's obligations under the Protection Plan, make any cash refunds or credits to the ultimate consumer-purchaser of the products involved in this action on account of defective or inoperative units. The plaintiff had no direct transactions with the ultimate purchaser-users of refrigerators in connection with the fulfillment of plaintiff's obligations under its Protection Plan.

36. The sealed units that were installed and replaced as described in finding 35 and repaired in the plaintiff's repair shops (as hereinafter described) included all sealed units which the plaintiff had undertaken to replace and repair, including units replaced under the One-Year Warranty, units replaced under the Protection Plan, and units replaced on an out-of-warranty "exchange" basis as described in finding 24.

37. The actual repairing of defective sealed units was conducted in shops devoted exclusively to such operations. The shops were located as follows during the period of the claim in this action: New York City, New York (until December 1948); Newark, New Jersey (from January 1949); Atlanta, Georgia (until August 1950); Kansas City, Missouri; and Oakland, California. In addition to these so-called "zone shops", the plaintiff in the same period maintained a similar repair shop at one of its main centers of

activity in Moraine City, Ohio. Although the Moraine City repair shop was physically located in the same building with other operations conducted by plaintiff, the personnel and equipment in the shop, as in the case of the zone shops, were exclusively engaged in the repairing of sealed units.

38. When a dealer determined that the sealed unit in a product manufactured by the plaintiff and owned by a user (entitled to service thereon) had become inoperative, the dealer would send to his distributor (or a branch of the plaintiff or Frigidaire Sales Corporation) an order for a replacement unit, furnishing on a standard form detailed information as to the product and the inoperative unit involved (including the identifying unit serial number). He would also indicate on the form whether the unit was to be replaced under the One-Year Warranty, under the Protection Plan, or upon an out-of-warranty "Exchange" basis.

39. The distributor (or branch or Frigidaire Sales Corporation) having purchased (and been charged by the plaintiff for) a number of crated sealed units from the "bank" in anticipation of such dealer orders, would ship and charge an appropriate crated unit to the dealers, simultaneously giving the plaintiff's offices in Dayton, Ohio, and either the Moraine City repair shop or the zone shop nearest the particular dealer full information (on a standard form) as to the product, the unit, and the classification (One-Year Warranty, Protection Plan, or Out-of-Warranty).

40. Upon receipt of the crated replacement unit, the dealer would remove the inoperative unit from the cabinet in the user's home, unpack and install the replacement unit, pack the inoperative unit in the crate in which the replacement unit had been received, and ship the crated inoperative unit to the repair shop for repair, using shipping documents furnished with the crate by the distributor (or branch or Frigidaire Sales Corporation).

41. Upon receipt of the inoperative unit, the repair shop would make the necessary repairs, recrate the unit and store it in the "bank" warehouse until ordered by a distributor (or branch or Frigidaire Sales Corporation) for re-use as a replacement unit.

42. As each inoperative unit was received at a repair shop, the plaintiff gave the distributor (or branch or Frigidaire Sales Corporation) who supplied the replacement unit to the dealer credit for the return unit. The returned unit was then placed in inventory and the plaintiff's "bank" inventory was thus brought back to its original level. Upon receipt of credit from the plaintiff, the distributor (or branch or Frigidaire Sales Corporation) gave a corresponding credit to the dealer who installed the replacement unit. In this cycle of transactions (plaintiff to distributor to dealer to plaintiff) every distributor and dealer charged for a sealed unit subsequently received an offsetting credit upon receipt by the plaintiff of the inoperative unit replaced; hence no such distributor or dealer was ever obliged to pay for a sealed unit used in the repair and replacement operation.

43. Although the plaintiff's zone shops were equipped to handle the majority of the repair problems encountered in the reoperation of sealed units, one operation—that of reoperating the so-called "compressor" of the sealed unit—was performed only at the repair shop located at Moraine City, Ohio.

44. The total expenses shown by the plaintiff's books as representing its costs through December 31, 1956, of fulfilling its obligations under Protection Plans sold from January 1, 1945, through August 31, 1951, were $12,621,562.12 and were made up of the following major categories of expense:

Cash payments to distributors and dealers	$ 2,269,166.51
Freight	1,200,351.25
Unit reoperation (less compressor)	4,708,199.64
Compressor	1,922,730.97
Units scrapped	935,414.92
Tools and equipment	79,640.82
Commercial expense	1,178,065.12
Experimental	509.85
Obsolete and unsalable stock scrapped	70,858.73
Miscellaneous	137,866.12
Water heaters (total expenses)[1]	37,486.19
Total	12,621,562.12

[1] The total expenses incurred by the plaintiff in fulfilling its obligations under Protection Plans sold in connection with electric water heaters have not been broken down into the various major categories of expense.

45. In the first six months of 1957 plaintiff incurred further expenses in the amount of $92,457.28 in fulfilling its obligations under Protection Plans sold from January 1, 1945, through August 31, 1951.

46. There is set forth in the following subparagraphs a description of the types of expenses treated by the plaintiff as the costs of its performance of its sealed unit operation as a whole, whether or not the performance was under a warranty:

(a) *Cash payments to Distributors (including branches) and to Dealers.* Distributors and dealers were required to make out-of-pocket expenditures, in cash or in kind, in connection with the plaintiff's repair and replacement programs, and for such of these expenditures as were made with respect to units handled under the Protection Plan, the plaintiff provided for reimbursement of the distributors and dealers involved by means of cash payments, sometimes referred to herein for convenience as "allowances." These cash payments were (i) to reimburse the distributor

for the clerical-administrative costs incurred by him in ordering replacement sealed units from the plaintiff, in warehousing and keeping accounting records of such units; in handling shipping documents, and in generally doing the "paper work" required of the distributor by the plaintiff's programs; (ii) to reimburse the dealer for similar "paper work" expense and for labor charges in handling replacement and inoperative sealed units as described in findings 39 and 40. All "allowances" described above were paid at fixed per-unit rates for each unit processed by the distributor or dealer receiving the "allowance" and all were actual payments (or credits) by the plaintiff.

(b) *Freight.* The sealed unit operation involved freight on three kinds of shipments: (i) shipment of replacement units to distributors prepaid by the plaintiff); (ii) shipment of such units to dealers by distributors or branches and charged to the plaintiff; (iii) shipment of inoperative units by dealers to the plaintiff's repair shops (shipped collect).

(c) *Unit Reoperation (less Compressor), Compressor Reoperation, and Tools and Equipment.* The major categories of expense incurred by the plaintiff in reoperating sealed units at its repair shops consisted of the following: (i) labor charges consisting of the wages paid by the plaintiff, according to time cards, to the full-time employees of the shops, including ordinary workmen, foremen, clerical workers, material handlers, and inspectors; (ii) payroll taxes and fringe benefits (including hospitalization insurance, vacation allowances, etc.) for the foregoing employees; (iii) an allocated portion of the expenses of the office of the superintendent of the Moraine City plant based upon the labor recorded for the Moraine City repair shop personnel as compared by the total labor recorded in the other operations supervised by that superintendent; (iv) material (spare parts, etc.) built into units in the process of reoperation; (v) supplies used in the repair shops (such as small tools, clerical forms, oil, rags, etc.); (vi) special

light tools and equipment (such as pressure gauges, "black light" equipment for testing for leaks, etc.) which were used only in the repair shops and were not fixed capital (i. e., depreciable) assets; (vii) power, light and heat charges based on actual meter readings at the zone shops and on an allocation according to "demand usage" or square feet of space used at Moraine City; (viii) depreciation of fixed assets including machinery and that portion of the Moraine City plant occupied by the repair shop; (ix) rent of the space occupied by the zone shops; (x) maintenance charges on plant and equipment; (xi) state and local taxes and insurance on repair operation inventories.

(d) *Units Scrapped.* Although all units in the "bank" described in finding 35 were carried at manufacturing cost in a continuing inventory account and thus were not charged as an expense of the sealed unit operation so long as they remained in an operating condition, from time to time inspection of an inoperative unit indicated that the unit was beyond repair, and the manufacturing cost of such a unit was then charged off as an expense.

The cost of replacement units sold by the plaintiff to its distributors (or its branches acting as distributors or Frigidaire Sales Corporation), for inclusion in the distributor's inventory or bank of available units for replacing those which developed defects in the hands of individual purchasers of the plaintiff's products during a warranty period, were accounted for by the plaintiff as part of the manufacturer's cost of sales, and not as a part of the expense of fulfilling its obligations under the Protection Plan. All employees of the plaintiff's sealed unit and compressor reoperating plants at Dayton and Moraine City, Ohio, were carried on the payroll of the operations at such plants.

(e) *Commercial Expense.* Also charged to the sealed unit repair and replacement operation were the clerical and other expenses of handling and storing units and spare parts between the plaintiff's manufacturing plant, and re-

pair shops, and its distributors, of billing and crediting distributors and dealers, of maintaining statistical records, and of handling the general accounting activities necessarily involved in the cyclical operation.

(f) *Experimental Expense.* To this account the plaintiff charged only the expenses incurred by the regular full-time employees of the repair shops in developing improvements in repair techniques.

(g) *Obsolete and Unsalable Stock Scrapped.* Particular sealed unit models and parts therefor were manufactured by the plaintiff simultaneously with the products they would later be used to repair, and the plaintiff's estimates of the quantities required occasionally turned out to be too high in the light of subsequent developments. In such cases the obsolete units and parts were scrapped and charged as an expense of the sealed unit operation, as were the costs of units and parts which were rendered unfit for use by physical deterioration or damage.

(h) *Miscellaneous.* The plaintiff charged to a "miscellaneous" account a variety of items such as the cost of shipping compressors from zone shops to Moraine City and back, the cost of making certain special repairs which could not be performed in the regular repair shops and therefore had to be done elsewhere, and the cost of converting particular sealed units into another kind of unit mechanism where available stocks of the latter were low.

47. The expenses detailed in finding 46 do not include: (i) supervisory administrative expenses above the level of works manager; or (ii) specialized service expense such as the cost of services rendered to the sealed unit operation by the plaintiff's sales, advertising, central office, public relations, patent, engineering, and design personnel. The works manager just referred to is the production official who is in charge of the superintendents of the various operating plants.

48. All entries made on the plaintiff's accounting ledgers, as heretofore described, were made in accordance with the accounting principles and practices in use throughout the General Motors Corporation and there is no evidence that the allocation methods used were designed, or used, for any purpose other than the accurate reflection of the costs of the sealed unit operation.

49. The plaintiff's repair shops kept monthly records of the number of inoperative sealed units received, and they segregated the accounts according to the type of product and the warranty classification; monthly returns rendered by the repair shops gave the plaintiff an accurate count of (for example) the number of inoperative sealed units returned each month from 1946 model refrigerators under the One-Year Warranty, the number of such units returned from 1946 model refrigerators as to which the Protection Plan was still in effect, and the number of such units returned from 1946 model refrigerators as to which neither was then in effect.

50. The returns furnished by the repair shops and similar reports supplied directly by distributors (see finding 38) furnished the basis upon which the plaintiff paid out the cash payments or "allowances" (see finding 46). Thus, the expense incurred by the plaintiff as "allowances" for the handling of units covered by the Protection Plan was determined by reference to the actual physical units involved.

51. The plaintiff found from its experience that although the expense of processing sealed units through the repair-and-replacement cycle (including shipment, physical repair, storage, etc.) might vary greatly as between any two particular units, over a period of time there was no significant difference between the average costs of processing (i) units which at the time of their repair were covered by the One-Year Warranty, (ii) units which at the time of their repair were covered by the Protection Plan, and (iii) units which

at the time of their repair were not covered by either of the foregoing contracts.

52. Relying upon the determination described in finding 51, the plaintiff computed the expense (other than "allowances"—see finding 50) attributable to the fulfillment of its obligations under the Protection Plan during a given period by allocating as Protection Plan expense that portion of the total repair-and-replacement expense for the same period which bore the same proportion to the total expense as the number of sealed units returned under the Protection Plan bore to the total number of sealed units returned to repair shops during the period involved. Thus (to use a hypothetical example) if 500 sealed units, of which 100 were from 1946 model refrigerators covered by the Protection Plan, were returned to the plaintiff's repair shops in December 1948, and if the total expense (other than cash "allowances" of the repair-and-replacement operation for the same month was $5,000 (as described in finding 46) the plaintiff would record $1,000 (plus cash "allowances" (upon its books as the December, 1948, expense of fulfilling its obligations under the Protection Plan with respect to 1946 model refrigerators.

53. The manner in which the plaintiff ascertained the expenses attributable to the fulfillment of its obligations under the Protection Plan (as described in finding 52) resulted in a fair and proper determination of such expenses. The total expenses incurred by the plaintiff through June 30, 1957, in fulfilling its obligations under Protection Plans on taxable products sold during the period January 1, 1945, through August 31, 1951, were $12,714,019.40.

54. The expenditures entering into the amount of $12,714,019.40 stated in finding 53 were made within the period January 1, 1945, through June 30, 1957, as follows:

1945	$ 101,724.97	1952	$2,220,652.52
1946	184,123.43	1953	1,680,149.14
1947	352,659.43	1954	1,107,397.18
1948	741,254.35	1955	759,914.66
1949	1,235,732.65	1956	542,323.34
1950	1,602,965.91	1957	92,457.28
1951	2,092,664.84		

55. All of the expenses incurred by the plaintiff in performing its agreement under the Protection Plan were charged to a special account, "Protection Plan—Warranty Reserve." No expenses were charged to this account other than those classified by the plaintiff as allocable to fulfillment of the Protection Plan. All of the amounts collected by the plaintiff for Protection Plans were credited to the special account called "Protection Plan—Warranty Reserve." Protection Plan collections were the only amounts credited at any time to this account. Within this account both collections and expenses were segregated in accordance with the product line and model year (e. g., 1945 model refrigerators) to which they were applicable.

56. The "Protection Plan—Warranty Reserve Account" is segregated by model lines. This account is reviewed by the plaintiff at least annually and at times more often. At the end of a given period of four to six years when it is felt that all obligations under the Protection Plans for a particular model year involved are completed, any debit or credit balances remaining in the account are closed out to an account designated "Miscellaneous Income Account" which is a type of profit and loss account on previous years' operations.

57. Since the early 1930's contracts to provide repair or maintenance service following the expiration of the manufacturer's warranty have been widely sold in metropolitan areas by independent service and repair companies which do not manufacture or sell the refrigerators which their repair contracts cover.

58. Beginning late in 1933 some manufacturers of household refrigerators commenced to sell a service contract which entitled purchasers of their products to the repair or replacement of the sealed refrigerating unit if it should become defective within four years following the expiration of the standard One-Year Warranty which covered the entire product, and by 1936 approximately two-thirds of the manufacturers of household refrigerators were selling such contracts. Since approximately 1937 the plaintiff and possibly one other manufacturer of household refrigerators have continued to sell service contracts on the sealed units of their products of the character just mentioned, and have required each individual purchaser of a household refrigerator to pay a separate charge therefor. Since approximately the same time the other principal manufacturers of household refrigerators have stated a single price for their products together with the sealed unit repair or replacement agreement of substantially the same kind as that of the plaintiff just mentioned, and have presumably passed on to their purchasers the excise tax effected upon the full amount of such price since the excise tax was apparently computed by them upon such price which included the price not only for the refrigerator but also for the agreement to repair or replace the sealed refrigerating unit for the four-year period following the expiration of the One-Year Warranty period. However, as heretofore shown, the plaintiff in computing an excise tax upon the products sold, which were covered by the Protection Plan, did not include the $5 charge for the Protection Plan as a part of the price of such products, and did not collect such a tax thereon from its customers.

59. From 1941 to date it has been the general practice of household electric refrigerator manufacturers to agree to repair or replace the sealed refrigerating units in their products if they should become inoperative after the expiration of the One-Year Warranty and prior to the expiration of the fifth year of use by the original purchasers.

that is, since 1941 it has been the custom in this industry to give a warranty substantially equivalent to the Protection Plan involved in this suit.

60. During the period covered by the claim in this action, 1945 through 1951, the plaintiff sold from 20 to 25 percent of all household refrigerators sold in the United States.

61. In substantially all cases the service required on the sealed units of the plaintiff's refrigerators, after the expiration of the One-Year Warranty, is attributable to certain types of wear and tear in the use of the product or to other factors beyond the control of both the plaintiff and the user of the product, such as operation of the unit under low voltage.

62. Throughout the years from 1936 to 1951, except the war years 1942 to 1945, inclusive, approximately 36 percent of the total number of sealed units of the plaintiff's household refrigerators which became inoperative from all causes within five years after sale to the original purchaser and which were returned to the plaintiff for reoperation, did so in the first year of use; approximately 20 percent became inoperative in the second year of use, 16 percent in the third year, 15 percent in the fourth year, and 13 percent in the fifth year of use.

63. The plaintiff has never considered that its obligation as a manufacturer to provide products free from defects in workmanship and material or other manufacturing errors extends beyond the period covered by its One-Year Warranty.

64. The Protection Plan constitutes an additional obligation assumed by the plaintiff at the time of the sale of the product to which it applies, which requires plaintiff to perform repair service on such product after the first year of usage through the fifth year of usage, and the obligation thus assumed is, and has been for many years, a general practice in the industry under similar circumstances.

65. Under the plaintiff's Protection Plan it was the practice in the years here involved to repair or replace without charge inoperative sealed cooling units during the second to fifth years, inclusive of use, whatever the reason therefor, except flagrant misuse of the product. In its performance under the Protection Plans, the plaintiff at no time had any direct transactions with purchaser-users, nor did the plaintiff pay cash or give credit to them against the original purchase prices of the refrigerators covered by the Protection Plans.

66. In June 1934, the NRA Code for the electrical refrigeration industry fixed the One-Year Warranty against defects in material or workmanship as the required obligation of a manufacturer of household refrigerators, and further provided that arrangements for repair or replacement service beyond that period might be worked out by individual plans. The National Recovery Administration was created under authority of the Act of Congress of June 16, 1933 (48 Stat. 195), and was terminated on April 1, 1936, under the terms of Joint Resolution No. 26, under date of June 14, 1935 (49 Stat. 375).

67. The Federal Specifications for electric refrigerators which are developed by various Government agencies, including the Bureau of Standards, prescribe the features and characteristics of refrigerators for the use of all Federal agencies in their purchasing programs. Throughout the period 1941 through 1956, the Federal Specifications provided for a One-Year Warranty on electric refrigerators, but made no mention of the Protection Plan or any comparable repair contract or extended warranty on the sealed units. In 1950 the applicable Federal specification read in part as follows:

> Service guarantee. The contractor guarantees the equipment against defective material, workmanship, and performance for a period of 1 year, said guarantee to run from date of acceptance of the equipment by the Government. The contractor agrees to furnish,

without cost to the Government, replacement of all parts and material which are found to be defective during the guarantee period * * *.

68. During World War II, the Service Division of the Office of Price Administration was charged with the supervision of the plaintiff's Protection Plan charge.

69. During the Korean War the Office of Price Stabilization ruled that the plaintiff's Protection Plan charge was covered by OPS Ceiling Price Regulation No. 34, governing "Service."

70. Both the Office of Price Administration and the Office of Price Stabilization considered the expenses attributable to the fulfillment of the plaintiff's One-Year Warranty as part of the plaintiff's manufacturing costs for the purpose of determining the elements of the plaintiff's price for its products.

71. As shown in finding 26, since its institution in 1936, the plaintiff has required that the Protection Plan be purchased on every product to which it was applicable except that in the case of purchasers of the plaintiff's ice cream cabinets and "multiple unit purchasers" the plaintiff has, at various times, not required the purchase of the Protection Plan but has made it available at the option of such purchasers.

72. The amounts received by the plaintiff by reason of the Protection Plan were to cover services and obligations to which the plaintiff committed itself under the Plan and to cover estimated expenses of fulfilling such commitments.

73. The $5 charge made by the plaintiff for the Protection Plan was based upon the plaintiff's determination at the time the Plan was first sold in 1936 that the probable cost for the repair of a single unit would be approximately $25 and that no more than 20 percent of the units sold would become inoperative during the four-year period of the Protection Plan. On that basis it was determined that

$5 from each purchaser of its products would meet the anticipated costs.

74. The plaintiff has re-examined its Protection Plan charge annually, and sometimes oftener, since the Plan was first sold.

75. A comparison of Protection Plan collections and expenses incurred in fulfilling the plaintiff's obligations under Protection Plans sold from 1936 through 1951 is approximately as follows:

Model year—all products	Collections	Expenditures incurred through June 30, 1957	Percentage of expense to collections
1936	$1,895.00	$531.48	28.05
1937	1,032,435.00	495,058.33	47.95
1938	1,407,100.00	931,241.37	66.18
1939	1,851,401.40	381,752.99	20.62
1940	3,077,406.40	615,270.23	19.99
1941	3,227,045.24	2,271,308.68	70.38
1942	809,448.96	556,251.28	68.72
1943	69,760.00	366,926.05	525.98
1944	92,355.00	464,610.00	503.07
1945	132,985.00	298,447.16	224.42
1946	6,590,575.00	5,302,738.14	80.46
1947	6,889,568.00	2,847,778.68	41.33
1949[1]	3,944,845.00	1,246,827.09	31.61
1950	6,802,275.00	1,446,639.86	21.27
1951	[2]2,912,814.00	[2]1,549,517.38	[2]53.20

[1] Includes collections and expenses in relatively small amounts applicable to the 1948 Model Water Heaters.

[2] A small amount of additional expenditures will be incurred during the balance of the year 1957.

The above table reflects for each model year, expenditures incurred over a period of approximately six years. For example, the amount of $298,447.16 shown as "Expenditures Incurred through 6-30-57" for Protection Plans sold on 1945 models represents expenditures incurred un-

der these Plans from a year after the dates on which they were sold to the ultimate user in 1945 through the date when the last Protection Plan obligation on 1945 models expired. Thus the total expenditures incurred under Protection Plans sold with 1945 models was not known to the plaintiff until about the end of 1951.

76. The average cost to the plaintiff of replacing a sealed unit under the Protection Plan from 1937 to 1956 was as follows:

Year	Cost in dollars	Year	Cost in dollars	Year	Cost in dollars
1937	23.73	1944	60.51	1951	64.02
1938	27.87	1945	63.50	1952	66.70
1939	30.21	1946	49.07	1953	75.60
1940	33.44	1947	54.07	1954	73.67
1941	34.49	1948	56.53	1955	78.51
1942	33.21	1949	60.75	1956	81.37
1943	47.84	1950	62.96		

77. The plaintiff's annual re-examination of its Protection Plan charge takes place at a meeting in September of each year between officials representing the plaintiff's engineering, financial, sales, and production departments and the general manager of the Frigidaire Division. At the meetings data and records covering past experience in respect to allocated costs of fulfilling Protection Plan obligations, and estimated future costs are analyzed. The plaintiff's experiences under its One-Year Warranty, as well as its Protection Plan Warranty, are also considered. As a result a determination is arrived at of the charge to be made for the Protection Plan. The plaintiff's product-pricing is not considered at such meetings.

78. At these annual meetings the plaintiff's past experience with its Protection Plan is considered in relation to its allocated costs per unit of repair and replacement; the number and percentage of units of each year's model that have become defective; the period in which the products became defective; the number of units remaining covered

by the Protection Plan and the further time during which those units would be covered; past collections and reserve account balances, and expenditures which might be anticipated in connection with various previous years' models.

79. For the purpose of estimating future costs on outstanding Protection Plans in connection with the annual examination of the Protection Plan charge, the plaintiff estimates on the basis of experience to date the number of units which will become defective over a future period of up to six years, a period during which the plaintiff's obligations under the Protection Plan for a given model might be outstanding. Along with past experience, the plaintiff considers all engineering changes in both design and materials as well as service factors in its models which might affect the future rate of defectives.

80. In estimating the future cost of replacing defective units under its Protection Plan, the plaintiff in its annual examination of the charge takes present costs of replacement and adds a 20 percent contingency to cover probable increases in costs over the future period of approximately six years.

81. Although the plaintiff examined the Protection Plan charge for the years 1945 and 1946, the charge was maintained at the pre-war level because the plaintiff was just starting its peace-time production and there was no reliable post war experience upon which to base any change in the charge. As will hereinafter appear, the $5 charge continued until September 1953, when it was changed to $3.50 for the 1954 models.

82. The first full-scale meeting on the Protection Plan after World War II was held in September 1946 to examine the charge and determine what it should be for the following year. At that time the plaintiff anticipated high future costs in fulfilling its obligations under the Protection Plan and therefore considered an increase in the Protection Plan charge. Among the factors considered were that

many of the plaintiff's workmen were inexperienced, that many substitute materials had to be used in the plaintiff's products and that the limited post-war experience on the Protection Plan had not been good. An increase in the Protection Plan charge would have required the approval of the Services Division of the Office of Price Administration. Because of its experience with that Division in other matters, the plaintiff did not believe that such approval could be obtained. As a result of the foregoing considerations the plaintiff decided to maintain its Protection Plan charge at $5.

83. For the years 1947, 1948 and 1949, the plaintiff continued to re-examine the Protection Plan charge at least annually and decided to maintain the charge at $5 for these years. Among the factors which the plaintiff considered in deciding to maintain the $5 charge were:

(1) The high rate of defectives during the first and second years of use of the plaintiff's 1946 and 1947 models which was substantially greater than the rate experienced by the plaintiff on its pre-war models.

(2) The fact that in 1947 the plaintiff introduced a new refrigerant which operated under higher pressures than the refrigerant previously used, and it was the fear of the plaintiff's engineering department that the new refrigerant might contribute to repair difficulties in the future.

(3) The plaintiff's analysis on September 30, 1949, of its past and possible future expenditures under Protection Plans sold on replacement units during the post-war period indicated that losses amounting to $473,867 might be realized on replacement unit plans sold in 1947, $539,727 on such plans sold in 1948, and $306,173 on such plans sold in 1949.

84. In September 1950 the plaintiff's annual examination of its Protection Plan charge revealed that the overall post-war experience had turned out better than previ-

ously anticipated and indicated in earlier years. The data presented indicated that it might be possible to reduce the charge at that time, but this was not done because the Korean War had begun and the plaintiff feared that there might be a return of war-time conditions similar to those experienced by the plaintiff during World War II which resulted in heavy losses on Protection Plans sold during those years.

85. In September 1953 the Protection Plan charge of $5 was reduced to $3.50 for 1954 models on the basis that plaintiff's experience during and following the Korean War turned out to be better than had been anticipated. This was the first change in the charge for the Protection Plan. This revised charge was maintained through 1956.

86. The Protection Plan charge was increased in September 1956 from $3.50 to $4.25 for 1957 models on the basis that the rate of defectives for 1952 and 1954 models was higher than had been estimated.

87. In 1936 when the Protection Plan was instituted, the plaintiff offered it on an optional basis with respect to 1935 models as yet unsold to the ultimate consumer. Out of a total of 12,000 products as to which the option to purchase the Protection Plan was thus extended, the option was exercised and the Protection Plan purchased with respect to approximately 7,000.

88. Substantial numbers of multiple-unit purchasers have exercised their option to buy the Protection Plan at the same charge made to purchasers who were required to buy it. For example, subsequent to the inauguration of the Protection Plan in 1936 and prior to January 1, 1942, approximately 100,000 household refrigerators were sold to multiple-unit purchasers by the New York branch of General Motors Sales Corporation, Frigidaire Division. All such purchasers were extended an option to buy the Protection Plan but none were required to buy. The Plan was purchased to cover approximately 93,000 units and was

rejected in seven percent of the cases. During the years 1946 through 1956 Frigidaire Sales Corporation's offices in Chicago, New York, Baltimore, Boston, and Dayton sold a total of 208,221 units to multiple-unit purchasers who were extended an option to buy the Protection Plan but not required to buy it. The plan was purchased to cover approximately 179,537 units and was rejected in approximately 14 percent of the cases.

89. During the period of the claim in this action, the plaintiff sold its Protection Plan on ice cream cabinets on an optional basis because most, if not all, purchasers of this product were commercial concerns that maintained their own repair and service facilities. The plan covered the sealed unit of the ice cream cabinets which was similar to the unit in household refrigerators. For those purchasers of ice cream cabinets who wished to buy the Protection Plan it was sold at the regular $5 charge. From 1946 to 1956 the plaintiff sold a total of 371,942 ice cream cabinets. The purchasers of these units purchased the Protection Plan on an optional basis to cover 256,288 units, that is, approximately 69 percent of the total units purchased.

90. Many of the purchasers of ice cream cabinets who purchased the Protection Plan on an optional basis were large national companies which maintained their own service and repair facilities for their equipment capable of servicing and repairing the ice cream cabinets sold to them by the plaintiff.

91. Repair contracts such as those described in finding 57 are sold to cover household refrigerators manufactured by the plaintiff. These contracts are sold on a yearly basis to cover either (a) repairs to the refrigerator relay and control systems after the expiration of the One-Year Warranty, or (b) to cover both the relay and control systems and the sealed unit after the expiration of the Protection Plan.

92. The G & H Refrigeration Sales and Service Corporation of New York, New York, and H. V. Lohmiller, Inc. of Philadelphia, Pennsylvania (and its predecessor, J. J. Pocock) are independent organizations which have been engaged for a number of years in the business of selling repairs contracts to cover refrigerators manufactured by the plaintiff on the basis described above. At the present time, the G & H Corporation has 16,712 repair contracts outstanding and H. V. Lohmiller, Inc. has approximately 8,000 such contracts outstanding. The G & H Corporation's repair contract charges for the years 1951 and 1957 were as follows:

	Per year 1951	1957
Repair of relays and controls and sealed unit, after the 5th year of refrigerator's use:		
Individual household refrigerators	$10.00	$10.00
Refrigerators in apartment houses	4.00	5.50
Charge attributable to coverage of the sealed unit only:		
Individual household refrigerators	6.00	5.00
Refrigerators in apartment houses	2.50	3.50

H. V. Lohmiller, Inc.'s charges for 1953 and 1957 were as follows:

	Per year 1953	1957
Repair of relays and controls and sealed unit, after the 5th year of refrigerator's use	$9.50	$9.95
Charge attributable to coverage of the sealed unit only	4.55	4.45

93. The rate at which sealed cooling units are returned for repair or replacement within a few years after the expiration of the Protection Plan is not appreciably greater than the rate of returns during the Protection Plan period, particularly since in the later years many refrigerators are turned in on new models. The cost of repairing or replacing units which become defective after the expiration of the Protection Plan is approximately the same as the cost under the Protection Plan.

94. The plaintiff's $5 charge for the Protection Plan during the period of the claim covered in this action was a reasonable charge in light of the increasing costs of fulfilling the obligations and the difficulty of estimating, under the circumstances prevailing during the period with which we are concerned, those costs over a future period of approximately six years; the substantial risk of heavy losses which the plaintiff bore under the Protection Plan; the value of the Protection Plan to its purchasers; the high rate of acceptance of the charge among experienced buyers such as multiple unit purchasers and buyers of ice cream cabinets; and, the substantially higher charge made by independent service and repair organizations for repair contracts comparable to the Protection Plan.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

LE COPY

FILED
SEP 29 1958
JAMES R. BROWNING, Clerk

No. 324

In the Supreme Court of the United States

OCTOBER TERM, 1958

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

JOSEPH F. GOETTEN,
MYRON C. BAUM,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and Regulations involved	2
Statement	3
Argument	7
Conclusion	15
Appendix	16

CITATIONS

Cases:

Ford Motor Co. v. *United States*, 156 F. Supp. 554 ..... 8, 12

General Motors Corp., Frigidaire Div. v. *United States*, 121 F. Supp. 932, certiorari denied, 348 U. S. 942 14

General Motors Corp., Frigidaire Div. v. *United States*, 146 F. Supp. 220 14

General Motors Corp., Frigidaire Div. v. *United States*, 147 F. Supp. 739 ..... 7, 11, 13

Wisniewski v. *United States*, 353 U. S. 901 15

Statutes:

Internal Revenue Code of 1939:

Sec. 3405 (26 U. S. C. 1952 ed., Sec. 3405) 2, 8, 16

Sec. 3441(a) (26 U. S. C. 1952 ed., Sec. 3441(a)) 2, 8, 16

Sec. 3443(a) (26 U. S. C. 1952 ed., Sec. 3443(a)) 2, 12, 14, 17

Sec. 3443(b) (26 U. S. C. 1952 ed., Sec. 3443(b)) 2

Revenue Act of 1950, c. 994, 64 Stat. 906, Sec. 606 (26 U.S.C. 1952 ed., Sec. 3405) 2-3, 18

Miscellaneous: Page

H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1932) (1939-1 Cum. Bull. (Part 2) 457, 485) ... 13

Treasury Regulations 46:

Sec. 316.12 ... 3, 19

Sec. 316.13 ... 3, 19

Sec. 316.14 ... 3, 14, 20

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 324

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. 1a-8a) is not yet reported. The prior opinion of the Court of Claims in this case is reported at 147 F. Supp. 739.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958. The petition for a writ of certiorari was filed on August 29, 1958. Jurisdiction

of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTIONS PRESENTED

Taxpayer, a manufacturer of refrigerators and related products, sells its products with a one year warranty against defects in material or workmanship in the entire refrigerator and with an additional four year warranty against defects and workmanship in the sealed refrigerating unit. For the latter warranty, taxpayer makes a charge of $5 which is required of all purchasers except purchasers of ice cream cabinets and "multiple unit" purchasers. Both the one year warranty and the additional four year warranty are provided by virtually all other manufacturers of refrigerators without a separate charge being made therefor. The questions presented are:

1. Is the $5 charge for the four year warranty covering the sealed refrigerating unit a part of the sale price for purposes of computing the manufacturer's excise tax on such products?

2. Do the costs incurred by taxpayer in fulfilling either the one year warranty or the additional four year warranty constitute "a discount, rebate or allowance," under the provisions of the Internal Revenue Code, entitling taxpayer to a refund, *pro tanto*, of the manufacturer's excise tax paid upon the sale of its products?

STATUTES AND REGULATIONS INVOLVED

Sections 3405, 3441(a), and 3443(a)(2) and (b) of the Internal Revenue Code of 1939, Section 606

of the Revenue Act of 1950, c. 994, 64 Stat. 906, and Sections 316.12, 316.13 and 316.14 of Treasury Regulations 46 are set forth in pertinent part in the Appendix, *infra*, pp. 16-20.

STATEMENT

This action involves claims for refund of manufacturers' excise taxes paid for the period from January 1, 1945, through August 31, 1951. Taxpayer is a manufacturer of refrigerators and related products which sells its products to Frigidaire Sales Corporation (a wholly owned subsidiary) and independent distributors, who in turn resell the products to independent dealers for resale to ultimate consumers. (Pet. 8a, 18a-19a.)

Since the 1920's, manufacturers of refrigerators, including taxpayer, have sold their products with a one year warranty against defects in workmanship and materials. Under this warranty, taxpayer undertook to repair or replace any part or parts found defective within one year of the date of delivery to the consumer. (Pet. 10a-11a.)

Beginning in 1933, taxpayer offered to its purchasers a service agreement or replacement contract, to take effect after expiration of the one year warranty, covering the mechanical refrigerating unit in its refrigerators. The charge, which was optional, was, at first, $6 per year and, later, $10 for four years. (Pet. 13a-14a.)

In 1936, taxpayer discontinued these optional service agreements. Instead, it offered an additional four year warranty on the sealed refrigerating unit.

Under this warranty, it was obligated to repair or replace the sealed unit if it became defective within four years after the expiration of the one year warranty. During the period here involved, the charge for such four year warranty on refrigerators was fixed at $5 and taxpayer has required that this charge be paid by all purchasers.[1] Since 1936 or 1937, all other manufacturers of refrigerators, except possibly one, have provided their purchasers similar additional four year warranties on the sealed refrigerating units, but without making any separate charge therefor. (Pet. 14a-17a, 30a-31a.)

Although taxpayer's one year warranty covered the entire refrigerator (including the sealed unit) and the four year warranty covered the sealed unit only for the four years after the expiration of the one-year warranty, taxpayer phrased the warranty certificate delivered to its purchasers to show a total coverage of five years on the sealed refrigerating unit and of one year on all other parts. (Pet. 17a.) The certificate delivered to the purchasers reads as follows (Pet. 17a-18a):

> We warrant this Frigidaire refrigerator to be free from defects in material and workmanship under normal use and service.
>
> 5-YEAR WARRANTY ON SEALED IN MECHANICAL UNIT.—At any time within five years from the date of delivery to the original purchaser, we will repair or replace without cost to the owner

[1] For purchasers of ice cream cabinets and "multiple unit" purchasers, the charge has, at various times, been optional. (Pet. 15a-16a.)

or user the Sealed-in Mechanical Unit [consisting of the condenser, refrigerant control, freezer, Meter-Miser compressor unit, the tubing used to connect this equipment, and the Sealed Cold-Wall system, as shown in gold in the illustration at the right], or any part thereof, provided our examination shows that such apparatus is defective. This 5-Year Warranty applies only to the Sealed-in Mechanical Unit. All other parts of the refrigerator including temperature control and starting relay, are covered only by the 1-Year Warranty.

1-YEAR WARRANTY ON ENTIRE REFRIGERATOR.—At any time within one year from the date of delivery of this Frigidaire refrigerator to the original purchaser, we will repair or replace without cost to the owner or user any part or parts of the refrigerator, provided our examination shows such part or parts to be defective.

These warranties do not apply to light bulbs—or to any part of the Frigidaire refrigerator which has been subject to misuse, neglect, alteration, accident, or to damage caused by transportation after the original installation—or to any damage caused by flood, fire, or acts of God. Service calls, other than those covered by conditions specified in these warranties as our responsibility will be made at the expense of the user. These warranties apply only to refrigerators installed in the United States and Canada.

For many years, it has been the custom and general practice in the industry to give a warranty on the sealed refrigerating unit extending through the fifth

year of use, although no separate charge has generally been made for such warranty. (Pet. 30a-31a.)

Taxpayer expended approximately $6,000,000 to fulfill its obligations under the one year warranty applicable to products sold between January 1, 1945, and August 31, 1951 (the period involved in this action). The comparable expenditures in fulfilling obligations under the additional four year warranty on sealed refrigerating units amount to $12,714,-019.40. (Pet. 12a, 28a.) The $5 charge imposed by taxpayer for this warranty on sealed refrigerating units resulted in total collections of $27,333,912 during the period involved. (Pet. 9a.) Taxpayer originally did not pay any excise tax on the amounts yielded by the $5 charge, and the Commissioner assessed an additional excise tax of $2,484,901.09 on the amounts so collected. This additional tax having been paid as assessed, taxpayer filed claims for refund, and this suit followed. (Pet. 9a-10a.)

In the court below, taxpayer sought refund of the tax imposed upon the amounts collected for the four year warranty on the sealed refrigerating units, or, in the alternative, a refund proportionate to the expenses incurred in fulfilling such warranty. It also sought refund of that part of the tax proportionate to the expenses incurred in fulfilling its one year warranty on the entire refrigerators.

The Court of Claims, on taxpayer's motion for summary judgment, concluded that previous decisions in favor of this taxpayer for earlier years were in error and held that the expenses incurred in ful-

filling both the one year and four year warranties did not constitute a "rebate" or "allowance" within the meaning of the applicable provisions of the 1939 Code and thus did not entitle taxpayer to a *pro tanto* refund. It was of the opinion, however, that the amount charged for the four year warranty was not part of the sale price and was excludible in computing the tax, subject to the limitation that the amount charged be reasonably related to the expenses incurred under such warranty. This opinion was based upon the premise that such warranty constituted an agreement by the taxpayer beyond the usual manufacturer's warranty. The case was referred to a commissioner for proof of the reasonableness of the charge and for proof as to whether the four year warranty was customary in the trade. (Pet. 2a; 147 F. Supp. 739.)

Upon receipt of the commissioner's report and findings, from which it appeared that the four year warranty, as well as the one year warranty, was customary in the industry, the Court of Claims decided that the premise of its previous opinion had been erroneous and that, since the four year warranty was also customary in the trade, the $5 charge was not excludible from the sale price for purposes of computing the excise tax. Taxpayer was therefore denied recovery. (Pet. 1a-4a.)

ARGUMENT

The issues presented by the decisions below have received consideration only by the Court of Claims and there is accordingly no conflict with the decision

of any other court. The Court of Claims has held that customary manufacturer's warranties are not excludible from the sale price in computing the manufacturer's excise tax and that the expenses incurred in fulfilling such warranties do not constitute a "rebate" or "allowance" within the meaning of the applicable statutory provisions so as to entitle taxpayer to a *pro tanto* refund.[2] Prior decisions by the Court of Claims permitting recovery on the latter ground have been repudiated by that court as erroneous and do not present a basis for invoking certiorari jurisdiction.

1. Under Section 3405 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 16), an excise tax is imposed upon the sale by manufacturers of refrigerators and related products. This tax, so far as here pertinent, is measured by the sale price as that term is defined in Section 3441(a) (Appendix, *infra*, pp. 16-17). The latter section requires the inclusion in the sale price of "any charge incident to placing the article in condition packed ready for shipment" and excludes "transportation, delivery, insurance, installation" and other charges not required to be included by the foregoing provision. Taxpayer primarily contends that its additional four year warranty on the sealed refrigerating units of its refrigerators is a repair contract, the charge for which is not includible in the sale price as thus defined.

---

[2] The question whether the expenses incurred in fulfilling customary manufacturer's warranties constitute a "rebate" or "allowance" is also presented by the petition in No. 144, *Ford Motor Co.* v. *United States*, a case in which the Court of Claims rejected that theory of recovery, as it has here.

What is involved here is nothing more than the customary warranty that a product will remain free from defects in material and workmanship for a designated period. A compulsory charge for such warranty is as much a part of the sale price as if it were included in the sale price without specific itemization. The findings of the court below make it clear that, in the case of refrigerators, it has become customary in the industry to warrant not only the entire refrigerator to be free from defects for a period of one year, but also to warrant the sealed refrigerating unit to be free from such defects for an additional period of four years. The two warranties are thus indistinguishable. Taxpayer and other manufacturers had an obligation under such warranties to correct any defects which became manifest in either the refrigerator or the sealed refrigerating units within the periods specified. Taxpayer's separate statement of a compulsory charge for the refrigerating unit warranty does not transform the warranty into a repair or "service" contract. Taxpayer, like other manufacturers, sells its products with the representation (expressed by warranty) that the entire refrigerator will remain free from defects for one full year of use and that the sealed refrigerating unit will remain free from defects for a total of five years of use. Any charge for such warranty is clearly a "charge incident to placing the article in condition packed ready for shipment" and is thus includible as part of the sale price.

Taxpayer concedes (Pet. 10-11) that the customary manufacturer's warranty is subject to excise tax since the purchaser is only receiving what he had a

right to receive—a product free from defects. It seeks to distinguish its additional warranty on the sealed units, though it, too, is customary, as representing a different type of obligation. The facts do not bear this out. Taxpayer's warranty certificate, delivered to the purchasers, expressly states (Pet. 17a-18a):

> We warrant this Frigidaire refrigerator to be free from defects in material and workmanship under normal use and service.
>
> 5 YEAR WARRANTY ON SEALED IN MECHANICAL UNIT—At any time within five years from the date of delivery to the original purchaser, we will repair or replace without cost to the owner or user the Sealed-in Mechanical Unit * * *, provided our examination shows that such apparatus is defective.

Taxpayer's warranty is thus a plain representation that the materials and workmanship are such that the sealed units will continue to function satisfactorily for a period of five years.[3] Its obligation is no different from any other warranty of a product for a designated period; the length of the warranty period certainly does not affect the nature of the obligation.[4] The only difference is one of degree—the

---

[3] It is immaterial that the court below found that the service required on sealed units was substantially due to certain types of wear and tear. (Pet. 31a.) Taxpayer's warranty was that its units would not cease to function satisfactorily "under normal use", thus representing that these units were so built as to satisfactorily withstand five years of normal wear and tear.

[4] Compare the "lifetime" warranties under which certain products, such as tires and fountain pens, are sold.

extent of the sturdiness which the component parts of the article sold are represented to possess.

Moreover, taxpayer's own practice was to equate its two warranties. The warranty certificate provides for a five year warranty on the sealed unit, not a one year warranty plus a four year repair contract. (Pet. 17a.) Taxpayer did not purport to state any different obligation in relation to the sealed units for the second through fifth years of use as distinguished from the first year; it phrased its warranty as a single one for the sealed unit. The reason for this is apparent; virtually all other refrigerator manufacturers sold their products with a five year warranty on the sealed units and taxpayer was forced to compete on the same terms. It cannot obtain different tax treatment merely because it elected to segregate part of the price and list it as a compulsory separate charge.

Taxpayer's warranty of the sealed units thus stands on the same footing as its warranty of the entire refrigerator. It is a representation that the article or part warranted will be free from defects for the time stated; if such defects appear within the specified period, taxpayer must, as the court below stated in its prior opinion (147 F. Supp. 739, 742), "remedy them at his own expense, in order to make good his representation that the article sold was free from defects."

There is no inconsistency or conflict in the decisions of the court below on this point. In its prior opinion in this case, the Court of Claims clearly held (147 F. Supp. 739, 741) that there was excludible from the sale price only a

2. Section 3443(a)(2) (Appendix, *infra*, p. 17) permits a credit or refund of excise tax if the "price" of a taxable article is "readjusted * * * by a bona fide discount, rebate, or allowance." The amount of the tax which may be refunded or credited is that amount which is proportionate to the part of the price which is "refunded or credited" to the purchaser. Taxpayer's alternative contention is that the expenses incurred by it in fulfilling both its one year warranty on the refrigerators and its additional warranty on the sealed refrigerating units constitute a "rebate" or "allowance" entitling it to a refund, *pro tanto*, of the excise tax paid. This position, as the Court of Claims has twice held, is without merit.

As has been noted, the warranties here involved are nothing more than a manufacturer's warranty under which taxpayer had an obligation to correct any defects which became manifest during the period specified. In making expenditures for that purpose, taxpayer was not making any readjustment of the sales price, but was merely fulfilling its contractual duty and, incidentally, adding to its cost of production.[6] *General Motors Corp., Frigidaire Div.* v. *United States*, 147 F. Supp. 739; *Ford Motor Co.* v. *United States*, 156 F. Supp. 554. As the Court of

---

reasonable charge for the maintenance of an article "beyond the warranty period customary in the trade". It now appears as a matter of record that the warranty on the sealed units is not for a period beyond that customary, but is the usual manufacturer's warranty.

[6] The Court below found that expenditures under the one year warranty were treated by taxpayer as part of the cost of its product. (Pet. 12a.)

Claims stated in *General Motors Corp., Frigidaire Div.* v. *United States*, *supra*, p. 742:

> The sales price was for an article free of defects. The cost of remedying defects that later appeared, therefore, cannot be an "allowance" to the purchaser to be deducted from the sales price. It was not an "allowance", but a sum spent to give to the purchaser what the manufacturer had represented it was selling him, to wit, a sound article.

The legislative history of the provision in question demonstrates the correctness of this view. The House Committee Report on the Revenue Act of 1932, in which this provision first appeared, states (H. Rep. No. 708, 72d Cong., 1st Sess., p. 39 (1932) (1939-1 Cum. Bull. (Part 2) 457, 485)):

> This last provision [allowing the credit or refund] covers readjustments such as cash or quantity discounts, credit for return of goods or containers, and any other bona fide rebate or allowance *amounting to a change in the sales price.* [Italics added.]

An expenditure to correct defects under a manufacturer's warranty is clearly not a change in the sale price, but is a cost occasioned by the obligation which the manufacturer assumed.[7]

---

[7] The fact that the Treasury Department recommended, as taxpayer asserts (Pet. 14-15), that the corresponding provisions of the 1954 Code should be amended to provide that expenses incurred in fulfilling manufacturer's warranties should not be deemed "allowances", that separate charges for such warranties should be included in the sale price, and that such amendments should be stated to be declaratory of

The statutory language points to the same conclusion. Section 3443(a)(2) refers to a refund or credit of that part of the tax which is "proportionate to the part of the price which is refunded or credited." In correcting defects in a warranted article, the manufacturer has not "refunded or credited" any part of the sale price, but has merely placed the article in the condition in which it was warranted to be at the time of sale.* The sale price is fixed at the time of the original sale; it is the price fixed for an article wholly free from defects. If defects become apparent within the warranty period, the manufacturer must incur additional costs to place the article sold in sound condition; such costs are not a credit or refund of the sale price.

Taxpayer points to the fact that in two prior cases involving earlier years, (*General Motors Corp., Frigidaire Div.* v. *United States*, 121 F. Supp. 932, certiorari denied, 348 U. S. 942; *General Motors Corp., Frigidaire Div.* v. *United States*, 146 F. Supp. 220)

---

the original intent of Congress, hardly demonstrates any error in the decisions of the court below. Nor does the fact that Congress failed to enact such declaratory amendments establish that those decisions were not in accord with the legislative purpose.

* The applicable Regulations express the same view. Section 316.14 of Regulations 46 (Appendix, *infra*, p. 20) provides that if an article is returned to the manufacturer under a guaranty of quality or service, a refund of tax may be made in proportion to the amount refunded to the vendee. These Regulations do not provide for any refund of tax where an article is repaired by the manufacturer and retained by the vendee.

the Court of Claims held that expenditures incurred in fulfilling its additional warranty on the sealed refrigerating units constituted an "allowance" under Section 3443(a)(2), and that in the decisions below it has held that the expenses incurred in fulfilling the one year warranty and the additional warranty do not constitute an "allowance" under that section. Taxpayer asserts (Pet. 15) that there is therefore an "intra circuit conflict" justifying the exercise of certiorari jurisdiction. No such "intra circuit conflict" exists here, however, for the Court of Claims has expressly recognized the error in its decisions in the two prior cases and has repudiated those decisions. Certainly, in such circumstances, a lack of harmony in decisions of the Court of Claims does not call for the exercise of certiorari jurisdiction. Cf. *Wisniewski* v. *United States*, 353 U. S. 901, 902.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
MYRON C. BAUM,
Attorneys.

SEPTEMBER, 1958

APPENDIX

Internal Revenue Code of 1939:

SEC. 3405. [as amended by Section 614, Revenue Act of 1942, c. 619, 56 Stat. 798] TAX ON MECHANICAL REFRIGERATORS AND SELF-CONTAINED AIR-CONDITIONING UNITS.

There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which sold:

(a) *Refrigerators.*—Household type refrigerators (for single or multiple cabinet installations) having, or being primarily designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline.

(b) *Refrigerating Apparatus.*—Cabinets, compressors, condensers, evaporators, expansion units, absorbers, and controls for, or suitable for use as parts of or with, household type refrigerators of the kind described in subsection (a) except when sold as component parts of complete refrigerators or refrigerating or cooling apparatus.

(c) *Air-Conditioners.* — Self-contained air-conditioning units.

(26 U. S. C. 1952 ed., Sec. 3405.)

SEC. 3441. SALE PRICE.

(a) In determining, for the purpose of this chapter, the price for which an article

is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

* * * *

(26 U. S. C. 1952 ed., Sec. 3441)

SEC. 3443. CREDITS AND REFUNDS.

(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * * *

(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

* * * *

(b) Credit or refund under subsection (a) shall be allowed or made only upon

compliance with regulations prescribed by the Commissioner with the approval of the Secretary.

(26 U.S.C. 1952 ed., Sec. 3443)

Revenue Act of 1950, c. 994, 64 Stat. 906:

SEC. 606. IMPOSITION OF TAX ON QUICK-FREEZE UNITS.

So much of section 3405 (manufacturers' excise tax on mechanical refrigerators and air-conditioning units) as precedes subsection (c) is hereby amended to read as follows:

"SEC. 3405. TAX ON MECHANICAL REFRIGERATORS, QUICK-FREEZE UNITS, AND SELF-CONTAINED AIR-CONDITIONING UNITS.

"There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which so sold:

"(a) *Refrigerators and Quick-Freeze Units.*—Household type refrigerators (for single or multiple cabinet installations) having, or being primarily designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline; household type units for the quick freezing or frozen storage of foods, operated by electricity, gas, kerosene, or gasoline; combinations of such household type refrigerators and units.

"(b) *Refrigerating and Freezing Apparatus.*—Cabinets, compressors, condensers, condensing units, evaporators, expansion units, absorbers, and controls (hereinafter referred to as 'refrigerator components') for, or suitable for use as parts of or with, household type refrigerators or quick-freeze units of the kind described in subsection (a), except when sold as component parts of complete refrigerators, refrigerating or cooling apparatus, or quick-freeze units. * * * "

(26 U. S. C. 1952 ed., Sec. 3405.)

Treasury Regulations 46 (1940 ed.):

SEC. 316.12. *Exclusion of charges for transportation, delivery, etc., generally.*—Charges for transportation, delivery, insurance, installation, and other charges actually incurred in connection with the delivery of an article to a purchaser pursuant to a bona fide sale, are to be excluded in computing the tax.

No other additional charge may be excluded in computing the tax unless it can be shown by adequate records to the satisfaction of the Commissioner that such charge properly is not to be included as a manufacturing or selling expense, or is in no way incidental to placing the article in condition packed ready for shipment.

SEC. 316.13. *Discounts and adjustments, generally.*—Readjustments in sale price (such as allowable discounts, rebates, bonuses, etc.) can not be anticipated. The tax must be based upon the original price unless the readjustments have actually been made prior to the close of the month in which the tax upon the sale is returned.

However, if the price upon which the tax was computed is subsequently readjusted, a proper credit may be taken against the tax due on a subsequent return, or an appropriate claim for refund may be filed. * * *

* * * *

Commissions to agents, or allowances, payments, or adjustments made to persons other than the manufacturer's vendee are not deductible from the sale price under any conditions for purposes of computing the tax.

SEC. 316.14. *Exchanges, etc.*—Where articles sold are returned to the manufacturer by his vendee and the original sale is entirely rescinded by refunding the entire amount paid, including tax, to the vendee, no tax is payable on the transaction and, if paid, the tax may be credited or refunded. * * * Where taxable articles sold are returned to the manufacturer by his vendee and only a part of the original sale price is refunded or credited to his vendee, the manufacturer is entitled to a tax credit computed on the portion of the sale price he refunds or credits to his vendee.

If an article is sold under a guaranty as to its quality or service and is thereafter returned and a rebate made pursuant to the guaranty, the manufacturer may claim credit or refund of such portion of the tax originally paid in respect of the article as is proportionate to the part of the price refunded to his vendee.

Where any taxable article is returned to the manufacturer thereof by his vendee for adjustment, replacement, or exchange, under a guaranty as to quality or service, and a new article given pursuant to the guaranty, free, or

at a reduced price, the tax shall be computed on the actual amount, if any, to be paid to the manufacturer for the new article.

U. S. GOVERNMENT PRINTING OFFICE: 1958 492712 420

LE COPY

Office-Supreme Court, U.S.
FILED
OCT 7 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 324

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION,
Petitioner,

v.

THE UNITED STATES, *Respondent.*

REPLY MEMORANDUM

Respondent's position is grounded on the misstatement that "[w]hat is involved here is nothing more than the customary warranty that a product will remain free from defects in material and workmanship for a designated period."

The findings of fact, which are quoted below and which are not contested by the respondent, clearly establish that petitioner's Protection Plan is a repair contract.

The Protection Plan

> "is an agreement by the plaintiff to repair or replace the refrigerating unit (or, in plaintiff's

parlance, the 'sealed unit') in one of plaintiff's products if the unit becomes inoperative within a prescribed period." (Finding 24, Pet. App. p. 14a).

Petitioner's purpose in selling the Protection Plan

"was to make better repair service available to all users of its products at a reduced charge." (Finding 27, Pet. App. p. 16a).

In substantially all cases

"the service required on the sealed units of the plaintiff's refrigerators, after the expiration of the One-Year Warranty, is attributable to certain types of wear and tear in the use of the product or to other factors beyond the control of both the plaintiff and the user of the product, such as operation of the unit under low voltage." (Finding 61, Pet. App. p. 31a).

Petitioner has

"never considered that its obligation as a manufacturer to provide products free from defects in workmanship and material or other manufacturing errors extends beyond the period covered by its One-Year Warranty." (Finding 63, Pet. App. p. 31a).

Thus the Protection Plan

"constitutes an additional obligation assumed by the plaintiff at the time of the sale of the product to which it applies, which requires plaintiff to perform repair service on such product after the first year of usage through the fifth year of usage, and the obligation thus assumed is, and has been for many years, a general practice in the industry under similar circumstances." (Finding 64, Pet. App. p. 31a).

The question presented, therefore, does *not* involve a warranty that a product is free from manufacturing defects. Rather the question is whether a charge made for "the additional obligation . . . to perform repair service" is subject to the excise levied upon the sale of manufactured products because provision for such repair service has become "a general practice in the industry."

Respectfully submitted,

NEWELL W. ELLISON
701 Union Trust Building
Washington 5, D. C.
Attorney for Petitioner

HENRY M. HOGAN
DANIEL M. GRIBBON
CALVERT THOMAS
COVINGTON & BURLING
Of Counsel

October, 1958